86-334

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ENSIGN ELECTRIC DIVISION OF
HARVEY HUBBELL INCORPORATED *and*
UNITED STEELWORKERS OF AMERICA,
LOCAL 5929, AFL-CIO-CLC,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, with respect to conduct which the National Labor Relations Board may properly treat as either lawful or unlawful, and which the Board first declares lawful and later declares unlawful, the Board may apply the later decision retroactively, to adjudge parties wrongdoers and assess backpay against them for acting in a manner that contemporaneous Board decisions had declared to be lawful.

2. Whether, assuming that a clause in a collective bargaining agreement conferring superseniority upon union officers to prevent their being laid off would otherwise violate the National Labor Relations Act, it is lawful if the employees *voted* to adopt the agreement containing that clause. [Stated otherwise, whether such a vote constitutes a waiver of the right the employees otherwise would enjoy to be free of such a clause.]

3. Whether a charge is timely under § 10(b) of the National Labor Relations Act, when it is filed more than six months after the negotiation of a collective bargaining agreement containing a superseniority clause alleged to be unlawful, and more than six months after the first implementation of that clause.*

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* There were no parties to this action in the court below except those listed in the caption. David R. Rice was the Charging Party before the National Labor Relations Board. Harvey Hubbell Incorporated has a Lighting Division, a Pulse Communications Division, a Hermetic Refrigeration Division, an Industrial Controls Division, a Kellems Division, a Plastics Division, and a Wiring Device Division; and has subsidiaries, Harvey Hubbell Canada, Inc., Raco Inc., Kerite Company, and The Ohio Brass Company.

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Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in *NLRB v. Ensign Electric Division et al.*, 767 F.2d 1100 (4th Cir. 1985), supplemented on rehearing, 783 F.2d 1121 (4th Cir. 1986).

OPINIONS BELOW

The opinion of the Administrative Law Judge is reported at 268 NLRB 624, and is reprinted *infra* at App. 29a-45a. The opinion of the National Labor Relations Board is reported at 268 NLRB 620, and is reprinted at App. 17a-28a. The first opinion of the United States

Court of Appeals for the Fourth Circuit is reported at 767 F.2d 1100, and is reprinted at App. 1a-8a. The opinion of that court on rehearing is reported at 783 F.2d 1121, and is reprinted at App. 9a-14a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 19, 1986 (App. 15a). A timely petition for rehearing was denied on April 1, 1986 (App. 16a). On June 25, 1986, Chief Justice Burger signed an order extending the time to file a petition for writ of certiorari to and including July 28, 1986 (App. 46a). On July 23, 1986, Justice Brennan signed an order further extending the time to file a petition for writ of certiorari to and including August 29, 1986 (App. 47a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), provide in pertinent part as follows:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Sections 8(b)(1)(A) and (2) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(1)(A), (2), provide in pertinent part as follows:

> It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . .;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . .

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in pertinent part as follows:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

STATEMENT OF THE CASE

Petitioner Ensign Electric ("the Company") manufactures electrical distribution equipment and component parts at a plant in Huntington, West Virginia. For many years, petitioner United Steelworkers Local 5925 ("the Union") has been the exclusive bargaining representative of the employees at that plant. All of the plant's bargaining unit employees are members of the Union.

In February, 1979, the Company and the Union reached tentative agreement on the terms of a proposed new collective bargaining agreement, which was then submitted to a vote of the employees and ratified by them. The agreement became effective February 10, 1979, and ran to October 1, 1981. It contained a seniority provision allocating protection against layoff on the basis of length of service, but with the following proviso that is the subject of this litigation:

> The local union president, vice-president, recording secretary, financial secretary, treasurer, and grievance committee shall have preferential seniority in the event of a layoff.

This "superseniority" clause was lawful under the decisional law of the National Labor Relations Board at the

time the 1979 agreement was negotiated, and indeed throughout the life of the agreement.

During the term of the agreement, extensive layoffs occurred, reducing the work force from 262 employees to 68. The Union's recording secretary and treasurer, who would not have had sufficient seniority to avoid layoff in the absence of the superseniority clause, remained at work by virtue of that clause—other employees being laid off in their stead.[1]

A laid-off employee filed a charge with the NLRB on September 15, 1980—19 months after the agreement containing the superseniority clause was ratified, and more than 12 months after the first exercise of superseniority pursuant to the clause[2]—attacking its continued implementation as an unfair labor practice. The General Counsel of the NLRB issued a complaint, and the case was tried before an Administrative Law Judge ("ALJ") who rendered his decision on September 9, 1981.

The ALJ found no violation of the Act, and recommended that the complaint be dismissed. He ruled that the thesis upon which the General Counsel predicated the complaint—that superseniority should be allowable only to those employees whose union offices invest them with direct responsibility for processing grievances and/or

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[1] This case involves only the validity of according superseniority to those two officers. The Union's president, vice-president and grievance committee had direct responsibility for the processing of grievances and/or in-plant administration of the collective bargaining agreement, and thus were lawfully accorded superseniority under the revised NLRB doctrine adopted in 1983 and applied by the NLRB retroactively to this case (see pp. 5-6, *infra*). The Union's financial secretary did not have such responsibility, but his length of service was great enough to protect him from layoff even without the benefit of superseniority.

[2] On August 31, 1979, the recording secretary would have been laid off based on his length of service, but remained at work by exercising his superseniority (App. 10a).

in-plant contract administration—was contrary to controlling Board law established in *Limpco Manufacturing Co.* and its progeny,[3] which authorized the conferral of superseniority upon other employees whose union responsibilities bear a "direct relationship to the effective and efficient representation of unit employees" (App. 34a-42a). The Union's recording secretary and treasurer had responsibilities meeting the *Limpco* test: their continued employment was necessary to assure a functioning local to assert the presence of the union on the job; and their layoff, which could result in their taking jobs elsewhere and/or losing interest in their union duties, would deprive the union of functions necessary to its very existence (App. 42a-45a).[4]

The General Counsel filed exceptions to the ALJ decision. The Board did not rule on those exceptions for over two years. While the exceptions were pending, the Board, having undergone a substantial change in its membership—none of the Board members who had voted for the doctrine of *Limpco* was any longer on the Board—announced in another case, *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983):

> We have reconsidered *Limpco Manufacturing Co.*, and its progeny, and have decided to overrule those

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[3] *Electrical Workers Local 623 (Limpco Mfg.)*, 230 NLRB 406 (1977), *enf'd sub nom. Anna M. D'Amico v. NLRB*, 582 F.2d 820 (3rd Cir. 1978); *Otis Elevator Co.*, 231 NLRB 1128 (1977); *American Can Co. (I)*, 235 NLRB 704 (1978); *Allied Industrial Workers, Local No. 148*, 236 NLRB 1368 (1978); *American Can Co. (II)*, 244 NLRB 736 (1979), *enf'd*, 658 F.2d 746 (10th Cir. 1981).

[4] In view of his ruling on the merits, the ALJ had no occasion to decide the Company's and Union's contention that the charge was untimely under § 10(b) of the NLRA, 29 U.S.C. § 160(b), because not filed within six months of the negotiation of the superseniority clause nor within six months of its first implementation, but simply noted that that position, "although in accord with the opinion of the Fifth Circuit Court of Appeals, is contrary to Board precedent. *Auto Warehousers*, 227 NLRB 628, 633-634 (1976), *enf. denied* 571 F.2d 860 (5th Cir. 1978)." App. 45a.

> cases to the extent they are inconsistent with this Decision. [266 NLRB at 406; footnotes omitted.]

Under the revised doctrine announced in *Gulton*, "superseniority accorded to officers who do not perform steward or other on-the-job contract administration functions is not permissible," *ibid.*

After its decision in *Gulton*, the Board decided the instant case. The Board did not question, and indeed implicitly acknowledged the correctness of, the ALJ's determination that the conferral of superseniority on the recording secretary and treasurer in the instant case was lawful under the doctrine of *Limpco*. But, the Board reasoned:

> In *Gulton Electro-Voice*, the Board recently reexamined the issue of superseniority for union officials and overruled *Limpco* . . . and its progeny. While superseniority benefits limited to layoff and recall still may be accorded to stewards, no superseniority benefits at all may be extended to union officials who, like the officers in this case who received superseniority, are not involved in grievance processing or other on-the-job contract administration or steward-like duties. [App. 19a, footnotes omitted.]

The Board then proceeded to apply *Gulton* retroactively, holding that the Company and Union had violated the NLRA by according superseniority to the recording secretary and treasurer in the period preceding *Gulton*, and ordering the Company and Union to make affected employees whole for their lost earnings during that period:

> [B]y according Recording Secretary McCoy and Treasurer Jarrell superseniority under the disputed clause with respect to layoffs on various dates between March 1980 and April 1981, and thereby affecting employees who would not have been affected if the collective-bargaining agreement had not accorded them superseniority, Respondent Employer discriminated against employees in violation of Section

> 8(a)(1) and (3) of the Act, and Respondent Union thereby violated Section 8(b)(1)(A) and (2) of the Act.
>
> * * *
>
> We have . . . found that the unlawful superseniority clause was so applied as to lay off employees . . . between March 1980 and April 1981 who would not have been laid off but for the illegal discrimination depriving them of seniority. Consequently, we shall order . . . that the Respondents jointly and severally make affected unit employees whole for any loss of earnings they may have sustained as a result of the discrimination against them . . . Respondent Employer's backpay obligation shall run from the effective date of the discrimination against the affected unit employees . . . [and] Respondent Union's obligation shall run from such effective date . . . [App. 19a-20a, 21a-22a.]

The effect of this decision will be a backpay award that will bankrupt the Union and constitute a severe economic burden on the Company. App. 6a.[5]

The NLRB applied to the Court of Appeals for the Fourth Circuit for enforcement of its order, and that

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[5] The Board did not discuss, but necessarily held *sub silentio*, that the employees had not waived their *Gulton* rights by voting to ratify the agreement containing the superseniority clause. And, the Board rejected the Company's and Union's contention that because the charge was filed more than six months after the negotiation of the agreement containing the superseniority clause, and more than six months after the first implementation of the clause, the charge was barred by § 10(b). The Board reasoned:

> [T]he consolidated complaint does not attack the execution of the contract. . . . Instead, only the Respondents' maintenance and enforcement of its superseniority clause within the applicable 10(b) period is in issue. It is well established that each act or incident of such enforcement constitutes a reaffirmance or renewed entering into of the superseniority clause. [App. 19a-20a, n.8.]

court, by a 2-1 vote, granted enforcement. The majority (Judge Murnaghan, joined by Judge Chapman) recognized that "changes in the composition of the Board" had "creat[ed] a new majority to support an earlier viewpoint expressed in dissent." App. 4a, n.1. That new viewpoint "must be upheld on appeal if it is reasonable," and the court found it to be so. App. 6a.

On the propriety of retroactive application of the Board's new viewpoint, the court declared that "the considerations governing retroactivity" of administrative agencies' decisions "are strikingly similar" to those governing retroactivity of judicial decisions. App. 4a, n.1. Here, there had been "vocal dissents" in *Limpco* and its progeny, so that "[t]he volte-face occasioned by the *Gulton* decision could not have come as a great surprise," and accordingly "the law was [not] settled in such a way as to make unjust the retroactive application of *Gulton* in the instant case." App. 2a-4a.[6]

Judge Haynsworth dissented, declaring that it was "grossly unfair, in the circumstances of this case, to apply the *Gulton* rule retroactively." App. 6a. The parties had negotiated a superseniority clause that was clearly sanctioned by then-current Board decisions. When it came time to enforce that clause, the parties, who could not know that years hence the Board would opt for a different rule, confronted a situation in which the *failure* to enforce the clause would have exposed the employer to suit for breach of contract and the union for breach of the duty of fair representation (App. 6a-7a). Judge Haynsworth concluded also that retroactive application of the Board's turnabout undermines national labor policy:

> The general purpose and design of the federal labor relations laws is to promote peace and order

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[6] The opinion made no reference to the waiver and time limits issues, which had been pressed by the Company and Union on appeal.

> in industrial relations. That purpose is not served by a retroactive application of a new rule which would introduce great uncertainty into the administration of a collectively bargained agreement. . . . [T]he parties to such a contract should be able to act in compliance with their agreement with assurance that the Labor Board will not later apply a different rule to their conduct. [App. 8a.]

The Company and Union petitioned for rehearing, which was granted by the panel. The panel, after hearing argument again, issued a supplemental opinion in which the majority adhered to the result (enforcement of the Board's order), without amplification of its position on the retroactivity issue. Judge Haynsworth, dissenting again, "adhere[d] to [his] view . . . that *Gulton* should not be applied retroactively to make exercise of these super-seniority rights unlawful." App. 14a.[7]

The Company and Union thereupon petitioned for rehearing from the supplemental decision, and suggested rehearing *en banc*, on, *inter alia*, the three questions presented here. That petition and suggestion were denied.

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[7] In its second opinion, the panel addressed the time limits issue that had not been discussed in its earlier opinion. Divided on this issue as well, the majority declared that because the superseniority clause was "unlawful on its face," each occasion on which the clause was implemented represented a separate violation that could be challenged within six months of its occurrence. App. 12a-13a. Judge Haynsworth disputed his colleagues' characterization of the superseniority clause as "unlawful on its face," noting that the question of its lawfulness, under *Gulton*, depends on whether "it extends super-seniority to one or more union officials who have no on-the-job responsibilities for contract administration," and it is not apparent from the face of the contract whether the officials listed had such responsibilities. App. 14a. In Judge Haynsworth's view, § 10(b) required that a charge be filed within six months of the first "actual layoff based upon a claim of super-seniority by a union official having no on-the-job responsibility for contract administration." *Id.*

REASONS FOR GRANTING THE WRIT

1. This case presents a fundamental and often-recurring question of administrative law that has never been addressed by this Court. The question arises out of the fact that many agencies, including the NLRB, are free, within limits, to treat particular conduct as either lawful or unlawful.[8] When such an agency declares conduct lawful, and then (usually as a result of changes in its membership) declares the same conduct unlawful, may the latter decision be applied retroactively to adjudge parties wrongdoers and impose backpay upon them for acting in a manner that contemporaneous agency decisions had declared to be lawful?

The lower courts uniformly have held that the question of retroactivity in these circumstances is to be judged by a balancing test "strikingly similar" to that of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (App. 4a n.1). Under that test, agencies' decisions may be applied retroactively if the surprise and hardship to the parties is outweighed by the statutory interest in retroactive application.[9] These courts have overlooked that agency decisions

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[8] This Court has repeatedly stressed the Board's "broad authority to construe provisions of the Act," *NLRB v. Financial Inst. Employees*, —— U.S. ——, 106 S.Ct. 1007, 1013 (1986), and the corresponding deference owed to Board constructions which, although not *compelled* by the Act, are "reasonable," *Pattern Makers League v. NLRB*, —— U.S. ——, 105 S.Ct. 3064, 3068, 3075, (1985); *id.* at 3076 (White, J., concurring). Accord: *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829-30 (1984); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495, 497 (1979); *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

[9] The passage universally cited by the Courts of Appeals as stating the correct test for retroactivity of administrative decisions is *Retail, Wholesale and Department Store U. v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972):

> Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which

fall into two categories—those where the statute is susceptible of only one "correct" construction, and those where the statute is susceptible of two constructions and the agency's choice of either will be upheld by the courts —and that while application of a balancing test comparable to *Chevron* is appropriate in the first category, it is not in the second (which includes this case).

When a statute is susceptible of only one "correct" construction—one that would render the conduct in question unlawful—but the agency has previously construed the statute *erroneously* to declare the conduct lawful, the respondent has engaged in conduct that the statute forbids; the claim to non-retroactivity is a claim that a *wrongdoer* should be exonerated from monetary responsibility because it relied upon decisions that turn out to have been erroneous. It is appropriate in that setting that the hardship that retroactive application would visit on the respondent be balanced against the interest in securing conformity to the statute's commands.

But when a statute is susceptible of two "correct" constructions, and the agency switches from one such construction to the other, the respondent's posture is quite different, and the retroactivity question likewise is different. Here, it is not true that the respondents engaged in conduct that the statute forbids; here, the respondents engaged in conduct that is unlawful only if the agency elects to treat it so. At the time respondents engaged in the conduct, the agency had chosen to declare it law-

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the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

This is the test applied by the court below (App. 4a-5a n.2). *See also, e.g., NLRB v. Niagara Mach. & Tool Works*, 746 F.2d 143, 151 (2nd Cir. 1984); *NLRB v. Wayne Transp., A Div. of Wayne Corp.*, 776 F.2d 745, 751 n.8 (7th Cir. 1985); *Local 900, Intern. U. of Elec., etc. v. NLRB*, 727 F.2d 1184, 1194-95 (D.C. Cir. 1984).

ful. To adjudge respondents wrongdoers in these circumstances, and to assess backpay against them, is to tax respondents for conduct that was *lawful* when committed.[10]

This Court has never addressed the propriety of retroactivity in the latter context. The lower courts[11] have found the application of a balancing test warranted by the following declaration in *Securities Comm'n v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (*"Chenery II"*):

> [W]e refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct . . . That such action might have a retroactive effect was not necessarily fatal to its validity. Every case

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[10] That the Board's construction in *Limpco* and the later contrary construction in *Gulton* both have been deemed reasonable (and thus permissible Board rules) is evident from the decisional law. *Limpco* was enforced on appeal (see n.3, *supra*). And the courts which have enforced *Gulton*'s overturning of *Limpco* have done so not on the ground that *Gulton* is the *only* permissible construction of the Act, but on the ground that it is *a* permissible construction. Representative is the D.C. Circuit's opinion enforcing the order in *Gulton* itself, *sub nom. Local 900, Intern. U. of Elec., etc. v. NLRB*, 727 F.2d 1184, 1189 (D.C. Cir. 1984):

> [W]e must uphold defensible Board decisions, regardless of how we might have decided the matter in the first instance. The Board in this case addressed all considerations relevant to the issue before it and frankly overruled any prior inconsistent precedent. Such is its prerogative . . . . It surely has arrived at one reasonable resolution of the problem in a reasonable manner. We will not substitute our judgment on a question of policy . . .

See also, NLRB v. Local 1131, 777 F.2d 1131, 1136 (6th Cir. 1985), and cases discussed therein. Similarly, in the instant case, the court below enforced the Board's *Gulton* rule because it was "reasonable," not because it was the only permissible construction of the Act (App. 6a).

[11] See, *e.g.*, each of the decisions cited in n.9, *supra*.

> of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

But, as is evident, the SEC's ruling in *Chenery II* was one of first impression, not the overturning of a prior contrary construction of the statute that was equally permissible. Moreover, the SEC did not adjudge anyone a wrongdoer in *Chenery II*, nor impose backpay or damages.[12]

Much closer to the instant case was the dictum in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). In *Bell* the Court held that the NLRB was free to reverse its prior rulings that buyers are managerial employees,

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[12] *Chenery* involved an application to the SEC for approval of a plan of reorganization. The SEC would not approve the plan so long as it provided for the conversion into common stock of preferred stock that had been acquired by management during the reorganization period. The plan was accordingly amended to remove that provision, and as thus amended was approved by the SEC over management's objections. In *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943) (*Chenery I*), this Court held that the SEC's refusal to approve the plan as originally proposed could not be sustained on the ground that had prompted it to so rule. On remand from *Chenery I*, management sought approval of an amendment allowing the conversion of its stock. The SEC again refused, this time assigning a reason that was sustained in *Chenery II*—that "the proposed transaction is inconsistent with the standards of §§ 7 and 11 of the Act." *Chenery II*, 332 U.S. at 199. This ruling denied management the opportunity to implement a desired financial transaction, and in that sense had monetary consequences, but the SEC did not adjudge the management officials to have been wrongdoers nor did it assess backpay or damages against them.

and thus to order an employer to bargain with a union on behalf of a unit containing such employees. The Court observed:

> The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result . . . [T]his is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here. [*Id.* at 295.] [13]

And, in *Heckler v. Community Health Services of Crawford*, —— U.S. ——, 104 S.Ct. 2218, 2224 n.12 (1984), the above-quoted page in *Bell* was cited as reflecting "the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests."

In short, this Court has never affirmatively sanctioned what the NLRB did here, and the emanations from this Court's opinions suggest that such a course is not allow-

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[13] In *Bell*, the NLRB had ruled that managerial employees who do not have a conflict of interest in labor relations are "employees" within the meaning of the Act, and on that basis had directed an election in a unit of buyers and certified the victorious union as exclusive bargaining representative. The employer refused to bargain with the union in order to test the buyers' employee status, and was found guilty by the Board of an unfair labor practice and ordered to bargain with the union. This Court ruled that all managerial employees are excluded from the status of employees, but remanded to permit the Board to determine whether some or all of the buyers were not managerial employees. The passage quoted in text was responding to the employer's contention that, as the Board's prior decisions had held buyers to be managerial employees, it should not be permitted to reach a contrary result in an adjudicative proceeding following remand. The reference to no "fines or damages" in the passage reflects the fact that the only remedy that could eventuate in the proceeding—even if the buyers ultimately were held not to be managerial employees and the certification thus sustained—was an order that the employer bargain with the union.

able. Because the issue arises often,[14] and because the lower courts have applied a balancing test that is wholly inapposite,[15] the issue warrants this Court's attention.

2. This case presents a second question worthy of this Court's attention: whether, even under a Board rule that forbids employers and unions *alone* from conferring superseniority upon the officers in question, the *employees* should be denied the right to confer such superseniority if that is their preference. As the earlier Board decisions overruled in *Gulton* reflect, there are employee interests that are advanced by conferring superseniority on union officers such as those involved here. *See, e.g., Limpco*, 230 NLRB at 407-08. While the current Board has concluded that those interests are outweighed by the statutory interest in protecting employees from discrimination

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[14] The frequent changes in NLRB rulings resulting from changes in its membership have been widely noted. See, *e.g.*, Walther, *The NLRB Today*, 36 Labor Law Journal 803 (1985); Bethel, *Recent Decisions of the NLRB—The Reagan Influence*, 60 Ind. L. J. 227 (1985); Morris and Turk, *A Labor Board Roundup and Forecast: The Balance Continues To Shift*, 11 Employee Relations Law Journal 32 (1985); Batten, *Recent Decisions of the Reagan Board: A Management Perspective*, 2 The Labor Lawyer 33 (1986).

[15] Of course, a balancing test would be unobjectionable if it invariably forbade retroactivity whenever the prior decision was a permissible construction of the statute. And it would be possible to squeeze that result from the test employed by the lower courts simply by decreeing that there is no statutory interest in retroactivity when the conduct conformed to prior rulings that represented a permissible construction of the statute. But that is not what the lower courts have done. Here, for example, the court below, applying the balancing test, *upheld* retroactive application on the ground that "vocal dissents" in the earlier Board opinions meant that the Board's "volte-face . . . could not have come as a great surprise" (App. 2a). To the same effect, see, *e.g., Local 900, supra*, 727 F.2d at 1195; *Niagara Mach. & Tool Works, supra*, 746 F.2d at 151; *Wayne Transp., supra*, 776 F.2d at 750-51.

in favor of union activity, is the Board entitled to impose its determination of the hierarchy of competing employee interests upon a workforce that has voted to make the opposite choice? In the terms in which the question is usually cast, is the right recognized in *Gulton* "waivable" by vote of the employees?

In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 706-07, n.11 (1983), this Court stated:

> [T]he National Labor Relations Act contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation.

This Court recognized as a limit on the waiver principle that it "presuppose[s] that the selection of the bargaining representative 'remains free.'" 460 U.S. at 705, quoting *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974). "Thus a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative." *Metropolitan*, 460 U.S. at 705-06. It seems plain that the superseniority clause in the instant case, approved by vote of the employees, does not "impair the employees' choice of their bargaining representative." The instant case thus contrasts sharply with *Magnavox*, *supra*, in which the union purported to bargain away the employees' rights to distribute literature supporting rival labor organizations.

Nonetheless, a number of Courts of Appeals have ruled that the right recognized in *Gulton* is not waivable by vote of the employees, reasoning that the *Gulton* right is not "economic." *Local 900*, *supra*, 727 F.2d at 1190; *Local 1131*, *supra*, 777 F.2d at 1138-39 and cases cited therein. And the court below so held *sub silentio* (see n.6 *supra*). We believe these courts have misunderstood *Metropolitan*, and have distorted national labor policy by

depriving employees of the right, by majority vote, to determine how best to realize their interests in effective representation.[16] At the least, the apparent inconsistency of these appellate decisions with *Metropolitan* signals the need for clarification of the circumstances in which waivers are to be permitted.[17]

3. In holding the unfair labor practice charge timely under § 10(b) of the NLRA, although filed 19 months after the superseniority clause was negotiated and more

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[16] In *Metropolitan*, 460 U.S. at 706-07, this Court cited *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), as upholding in appropriate circumstances the subordination of individual interests to "securing the good of the entire bargaining unit." And *Ford Motor* recognized that superseniority for union officers is a legitimate means to that end, 345 U.S. at 339:

> The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility. We have held that a collective-bargaining representative is within its authority when, in the general interest of those it represents, it agrees to allow union chairmen certain advantages in the retention of their employment, even to the prejudice of veterans otherwise entitled to greater seniority. *Aeronautical Lodge v. Campbell*, [337 U.S. 521] at 526-529.

[17] The Board's failure to find a waiver here is particularly ironic in light of its decision in *Gem City Ready Mix Co.*, 270 NLRB 1260 (1984), in which it upheld a strike-settlement agreement conferring superseniority upon strike replacements—an agreement that waived the strikers' rights recognized in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). In upholding the waiver, the Board stressed that the employees had voted to ratify the agreement containing the superseniority clause. 270 NLRB at 1260, 1261. As is evident, the waiver in *Gem City*—which conferred no benefit on the strikers, and indeed subordinated their interests to those who had taken their jobs during the strike—was made *in extremis*, the employees lacking the bargaining power to secure a collective bargaining agreement from the employer absent the waiver. It would be a strange statute, indeed, that sanctioned *that* waiver and yet did not permit employees to vote freely to enhance the quality of their union representation by assuring the presence in the plant of key local union officials.

than 12 months after its first implementation, the decision below is in square conflict with the Fifth Circuit's decision in *NLRB v. Auto Warehousers, Inc.*, 571 F.2d 860 (5th Cir. 1978) (charge must be filed within six months of initial according of superseniority status to union officer). The majority below professed to find that decision distinguishable, because here (the majority reasoned) the superseniority clause was unlawful "on its face." But as Judge Haynsworth pointed out in dissent, the clause is *not* unlawful on its face, even under the rule of *Gulton*: to know whether the clause confers superseniority upon persons not eligible therefor under *Gulton*, one must know the duties of the officers listed in the clause, and those duties are not specified on the face of the contract. App. 14a. Thus, in *Gulton* itself, the Board explained that under the rule of that case the dispositive issue is not the officers' titles, but the responsibilities assigned to them, 266 NLRB at 408 n.9, and in the instant case the Board's determination turned on the record evidence respecting those responsibilities, App. 18a, 19a.[18] In *Auto Workers*, the Fifth Circuit, for like reasons, had rejected a contention that the superseniority clause was unlawful "on its face," 571 F.2d at 863.

The conflict in circuits stems, as a reading of the decisions will confirm, from disagreements as to the meaning of this Court's decision in *Local Lodge No. 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960), see particularly *id.* at 420 n.12 and accompanying text. In view of the overwhelming importance of clarity in the law as to the proper interpretation and application of § 10(b), more explicit guidance from this Court is warranted regarding the time limits that apply to challenges to seniority provisions.

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[18] Not surprisingly, the opinion of the *Board* in the instant case, as contrasted with that of the majority in the court below, did not predicate the § 10(b) ruling on the proposition that the clause was unlawful on its face. See, App. 19a-20a, n.8.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1658

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

ENSIGN ELECTRIC DIVISION OF HARVEY HUBBLE, INC., and UNITED STEELWORKERS OF AMERICA, LOCAL 5925, AFL-CIO-CLC,
Respondents.

CENTER ON NATIONAL LABOR POLICY, INC.,
Amicus Curiae.

On Application for Enforcement of an Order of the National Labor Relations Board

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Argued: March 6, 1985 Decided: July 22, 1985

Before MURNAGHAN and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

MURNAGHAN, Circuit Judge:

A collective bargaining agreement provided super-seniority for certain executive personnel of a union, *inter*

alia, the recording secretary and the treasurer, of the United Steelworkers of America, Local 5925 AFL-CIO-CLC. The National Labor Relations Board heard charges by a member of the employer's work force against both the employer and the union challenging the maintenance and enforcement of a preferential seniority clause as an unfair labor practice under the National Labor Relations Act, 29 U.S.C. §§ 8(b)(1)A and (2), 8(a)(1) and (3). The NLRB, finding that the challenge was justified, followed its recent decision in *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406, (1983), *enforced sub nom. Local 900, International Union of Electrical Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984) and determined that super-seniority preference should not have been accorded the union officers who benefited by super-seniority because their duties did not involve them in grievance processing or on-the-job contract administration. *Gulton* overruled a prior Board decision in *United Electrical, Radio and Machine Workers of America, Local 623 ("Limpco")*, 230 N.L.R.B. 406 (1977), *enforced sub nom. Anna M. D'Amico v. NLRB*, 582 F.2d 820 (3rd Cir. 1978) and indicated that it would approve as lawful "only those super-seniority provisions limited to employees, who, as agents of the union, must be on the job to accomplish their duties directly related to administering the collective bargaining agreement." *Gulton, supra*, 266 N.L.R.B. at 409.

The volte-face occasioned by the *Gulton* decision could not have come as a great surprise. The question of the extent to which functional union officials could be insulated from lay-off in preference to rank and file union members had been debated in a number of cases with vocal dissents [1] and it could not, therefore, have been said

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[1] Prior to the *Gulton* decision the Board considered the issue of preferential seniority for certain union officers on a number of occasions. The issue was first raised in *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656 (1975), *enforced sub nom. NLRB v. Milk Drivers & Dairy Employees Local 338*, 531 F.2d 1162 (2d Cir. 1976), where

that the law was settled in such a way as to make unjust

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the Board found a super-seniority provision on layoff and recall lawful for union shop stewards because their duties "furthered the effective administration of the bargaining agerement on the plant level by encouraging the continued presence of the steward on the job." *Id.* at 658. However, the Board refused to extend super-seniority to union shop stewards beyond layoff and recall; such provisions were presumptively unlawful, the burden of rebutting that presumption falling on the party asserting their unlawfulness.

Two years later, in *Limpco, supra,* 230 N.L.R.B. 406 (1977), the Board was once again confronted with the same troubling issue. In that case the challenged super-seniority provision accorded preferential status in layoff and recall to the union's recording secretary, who performed no steward-like job functions. A Board majority upheld the preferential seniority provision, reasoning that the union officer in question held official responsibilities which bore "a direct relationship to the effective and efficient representation of unit employees." *Id.* at 407-08. The union officer was, therefore, entitled to the same presumption accorded the union steward since she was just as involved in the administration of the collective bargaining agreement.

Nevertheless, the dissenters in *Limpco* made clear that the matter was not neatly settled among the Board members. According to them, super-seniority provisions favoring union officials could only be held presumptively valid when the officers' responsibilities concerned on-the-job grievance adjustment. Only when the union officer functioned to process grievances and enforce the collective bargaining agreement on the job could the discriminatory effect of the super-seniority provision be justified.

The division of viewpoints was made even clearer in *The American Can Company,* 244 N.L.R.B. 736 (1979), *enforced,* 658 F.2d 746 (10th Cir. 1981), where it was plainly stated that the ". . . Board members have widely divergent views on *Dairylea* issues . . . ." *Id.* at 737. Two members in dissent disagreed with any restrictions placed on super-seniority by *Dairylea* and its progeny. Member Murphy, in her concurring opinion, employed the reasoning of the *Dairylea* line of cases but concluded that the activities of the officers in question (a union trustee and guard) did not further the collective bargaining relationship. Members Jenkins and Penello, the dissenters in *Limpco,* found the super-seniority clause in question invalid on its face and would only allow union officers to benefit from super-seniority where the officers served as shop stewards or engaged in the administration of the contract at the work place

the retroactive application of *Gulton* in the instant case.[2]

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and during their hours of employment. *See also Otis Elevator Company*, 231 N.L.R.B. 1128 (1977) (dissent by Jenkins and Penello); *Expedient Services, Inc.*, 231 N.L.R.B. 938 (1977); *Allied Industrial Workers of America (Allen Testproducts)*, 236 N.L.R.B. 1368 (1978) (dissent by Jenkins and Penello); *APA Transport Corp.*, 239 N.L.R.B. 1407 (1979) (dissent by Fanning; partial dissent by Truesdale); *McQuay-Norris, Inc.*, 258 N.L.R.B. 1397 (1981) (dissent by Fanning).

Hence, the Board's *Gulton* decision cannot be considered an abrupt break from prior precedent. *See Landahl v. PPG Industries, Inc.*, 746 F.2d 1312, 1315 (7th Cir. 1984) (*Delcostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) retroactively applied where the decision represented "a clarification of the law, not a 'clear break' with past precedent.") Although *Landahl* concerns the retroactive application of a judicial rather than administrative decision, the considerations governing retroactivity are strikingly similar. *Compare Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971) *with Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). Like a judicial body, an administrative tribunal remains free to clarify its position on a case-by-case basis. *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1946); K. Davis, Administrative Law § 20.7 (2d Ed. 1983).

Although coming on the heels of changes in the composition of the Board, the decision was a clear example of an administrative body reviewing its earlier decisions which were replete with arguments on all sides of the issue, and creating a new majority to support an earlier viewpoint expressed in dissent. *See Local 900*, 727 F.2d at 1188.

[2] In ordering enforcement in *Gulton*, the D.C. Circuit dealt extensively with the retroactivity question, and, in especially pertinent part, observed:

> *The Merits of the Retroactivity Claim.* In determining whether a new rule developed in adjudication should be given retroactive effect, the ill effects of "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 . . . (1947). More specifically, courts often consider five factors in evaluating that balance:
>
> (1) whether the particular case is one of first impression,
> (2) whether the new rule represents an abrupt departure

Accord, NLRB v. Niagara Machine & Tool Workers, 746 F.2d 143 (2d Cir. 1984); *Local 900, supra*, 727 F.2d 1184 (D.C. Cir. 1984); *Local 1384, United Auto, Aerospace and Agricultural Implement Workers of America UAW v. NLRB*, 756 F.2d 482 (7th Cir. 1985).

> from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.
>
> *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).
>
> For a variety of reasons, it is often appropriate to apply a rule in the first case in which a given problem arises, . . . but the present case is hardly one of first impression; as is evident from the discussion in part II, superseniority clauses have been litigated for years. At the same time, however, the reasons against applying a new rule in a case of second impression, principally "lack of notice and the degree of reliance on former standards, ". . . are not compelling here. The cases since 1975 have demonstrated widely divergent views among the Board members and have been decided on several bases. The union surely had notice that superseniority clauses were under attack and were not wholly secure, and there is no evidence that the union relied on any previous Board rule in fashioning this particular superseniority clause. Given the confusion in the Board's and courts' decisions over the years, the new rule cannot be called an abrupt break with a well-settled policy; the unanimity of the new decision, moreover, looks much like an "attempt[] to fill a void."
>
> Neither does the union fare well on the third factor—reliance. . . .
>
> *Local 900, International Union of Electrical Workers v. NLRB*, 727 F.2d 1184, 1194-95 (D.C. Cir. 1984).

The record in the instant case is silent as to any reliance placed by the union. At the most it indicates that the super-seniority clause was in existence no later than 1970 and was expanded to include stewards between 1970 and 1979. The complained of exercise of the clause occurred on August 31, 1979 for the recording secretary and on July 25, 1980 for the treasurer.

The Board's decision must be upheld on appeal if it is reasonable and supported by the record. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). We are satisfied that the NLRB decision was supported by the record and, consequently, we grant enforcement of the NLRB order dated January 25, 1984.

ENFORCEMENT GRANTED

HAYNSWORTH, Senior Circuit Judge, dissenting:

I respectfully dissent.

It seems to me grossly unfair, in the circumstances of this case, to apply the *Gulton* rule retroactively. We are told that the back pay award would bankrupt the local union and would constitute a severe economic burden upon the employer, and the reinstatement of nine or more former employees would occasion serious disruptions in the lives of present employees in a work force which, we are informed, has dwindled to approximately fifteen. Furthermore, it would occasion serious disruptions and uncertainties in the management of labor relations contracts when parties are called upon to conduct themselves as if a narrow majority of Board members, instead, had been a dissenting minority.

This provision for super-seniority first came into the contract before the Labor Board had addressed the problem, and was carried over into the agreement dated February 10, 1979. At the time of the enforcement of the super-seniority clause in the 1979 agreement, the Board's 1977 decision in *Limpco* appeared to be controlling. While there had been a strong dissent in that case, a majority of the Board members had aligned themselves in support of the position of the union and the employer in this case. They were entitled to place substantial reliance upon

that decision of the Board. The presence of the dissent would diminish the strength of that reliance, but it should not dissipate it, when *Limpco* was recent and *Gulton* a good four years into the future. Even if attention is focused on the contract renewal in 1979, one could not realistically expect of the union the kind of prescience that might have led them to forego their contractual advantage.

At the time the parties acted, enforcement and compliance with the agreement between the union and the employer was the only possible course open to them. Had the parties anticipated that in some future year the Board would come down with its decision in *Gulton*, and the union had then waived its contractual right and the employer broken the super-seniority clause by laying off the union's recording secretary and its treasurer, they would have immediately exposed themselves to indefensible suits by the secretary and the treasurer. The secretary and the treasurer could have alleged and proved a violation by the union of its fiduciary duty of fair representation and the breach of the collective bargaining agreement by the employer. Neither the union nor the employer could offer any defense, and they would have suffered judgment against them both. A retroactive application of *Gulton*, however, imposes substantial sanctions upon them because they did not take a course which, at the time, was clearly unlawful.

The business of the employer has been a shrinking one. Its work force of over 260 people had shrunk to 68 by the time of the hearing before the administrative law judge. We are informed that it has continued to dwindle until now it is only approximately 15. Natural attrition cannot be expected to make room for nine or more other employees to whom the employer is required to offer reinstatement. Enforcement of the order will likely require the discharge of some of the present employees, not just the discharge of the recording secretary and treasurer.

The general purpose and design of the federal labor relations laws is to promote peace and order in industrial relations. That purpose is not served by a retroactive application of a new rule which would introduce great uncertainty into the administration of a collectively bargained agreement. Unless enforcement or maintenance of a particular contractual provision has been held by the National Labor Relations Board to be an unfair labor practice, the parties to such a contract should be able to act in compliance with their agreement with assurance that the Labor Board will not later apply a different rule to their conduct.

I would not punish the union and the employer for compliance with their bargain when, at the time they acted, their super-seniority provision had been approved by the National Labor Relations Board. It was simply beyond the capacity of the parties to elevate the views of the dissenters to an official declaration of the law by the Board. Without such a declaration there was no alternative to compliance with their bargain.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Caption Omitted in Printing]

Argued: December 5, 1985 Decided: February 9, 1986

Before MURNAGHAN and CHAPMAN, Circuit Judges HAYNSWORTH, Senior Circuit Judge.

CHAPMAN, Circuit Judge:

On July 22, 1985, an opinion was filed deciding that *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406 (1983), *enforced sub nom. Local 900, International Union of Electrical Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984), was not such an abrupt break from prior precedent that it would come as a great surprise, and thus it could be given retroactive application. *See NLRB v. Ensign Electric Division of Harvey Hubble, Inc.*, 767 F.2d 1100 (4th Cir. 1985). We granted the petition for rehearing in order to reconsider the question: whether this action is barred by the six month limitation contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982). This limitation provides in pertinent part:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . .

This point was presented and argued in the original appeal, but not mentioned in our opinion.

Ensign Electric manufactures electrical distribution equipment and component parts in West Virginia for the mining industry. It has maintained a collective bargaining relationship with Local 5925 of United Steel Workers of America for many years. Since 1970 these collective bargaining agreements have contained a clause granting preferential seniority to local union officials, including the president, vice president, recording secretary, treasurer, and grievance committeemen.

In March 1979, the union elected new officers including Douglas Jarrell as treasurer and George McCoy as recording secretary. About the same time, Ensign Electric was required to lay off a number of employees, and from March 1979 to April 1981, the work force was reduced from 262 employees to 68 employees. In order to protect his job, George McCoy, the recording secretary, exercised preferential seniority on August 31, 1979. The layoffs continued, and Douglas Jarrell exercised his preferential seniority rights as treasurer of the union on April 10, 1981. When each of these officers exercised his "super seniority" rights, an employee with greater natural seniority was laid off.

The original complaint was filed by the National Labor Relations Board on November 4, 1980, as a result of charges made by a laid-off employee and union member filed September 15, 1980. This complaint was amended on June 10, 1981, and covered claims of employees laid off on April 10, 1981, as a result of the exercise of super seniority rights by the union treasurer.

The employer and the union contend that the present action is untimely because the following events took place outside the six-month § 10(b) period: (1) the initial negotiation of the super seniority clause, which first appeared in the contract between Ensign Electric and Local

5925 in 1970; (2) the latest renewal of the contract containing this clause (February 10, 1979); (3) the secret ballot election of Jarrell as treasurer and McCoy as recording secretary in March 1979; (4) the assumption of office by Jarrell and McCoy in June 1979; (5) the wide discussion of the super seniority clause among the members as early as 1979; and (6) the actual exercise of preferential seniority August 31, 1979 by recording secretary McCoy.

The employer and the union agree that the exercise of preferential seniority on April 10, 1981, by the union treasurer Jarrell was within six months of the April 22, 1981 filing of the charge with the Board, but they contend that such exercise was merely a later manifestation of the officer's already changed status, and since neither the union nor the employer made any further determinations regarding the status, duties, or identities of the individual union officers within six months of the filing of the charge, such charge was barred by § 10(b). They cite as support *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960), and *NLRB v. Auto Warehousers, Inc.*, 571 F.2d 860 (5th Cir. 1978).

We find that *Local Lodge No. 1424* and *Auto Warehousers* are not controlling. In *Local Lodge No. 1424*, the employer and the local union had entered into a collective-bargaining contract which contained a clause recognizing the union as the exclusive bargaining representative for all of the employees. It also contained a union security clause by which all employees were given 45 days to join the union. It later developed that at the time of the execution of this contract, the union did not represent a majority of the employees. This lack of majority status at the time of execution was the subject of charges filed with the Board ten months and twelve months after the execution of the original contract. The Board conceded that charges as to the contract's execution were barred by § 10(b), but it argued that it was an unfair

labor practice to enforce the illegal argument and that this was not time barred. The Board admitted that the union security clause was valid on its face, but contended that since it was entered into when the union did not have majority status, it gave rise to two separate unfair labor practices, one being the execution of the contract, and the other being its continued enforcement. In discussing the use of § 10(b) the court distinguished two factual situations.

> The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10 (b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

362 U.S. at 416-17 (footnote omitted). The Court found *Local Lodge No. 1424* to fall within the latter category because enforcement of the union security clause was not an unfair labor practice except for the fact that the agreement was executed at a time that the union did not have majority representation, and this event was time-barred.

Local Lodge No. 1424 does not apply to a contract that is invalid on its face. 362 U.S. at 423. An agreement

that is unlawful on its face does not require the proof of facts or unfair labor practices outside the six-month period. This is the factual situation we confront, for the contract between Ensign Electric and Local 5925 grants super seniority to union officials solely because of their status as union officials and discriminates against employees for "union related" reasons.

In *NLRB v. Auto Warehousers, Inc.*, there was a collective bargaining provision allowing shop stewards super seniority for purposes beyond layoff and recall. The court analyzed the *Auto Warehousers* situation under *NLRB v. Milk Drivers & Dairy Employees, Local No. 338*, 531 F.2d 1162 (2d Cir. 1976) and found such super seniority for purposes beyond lay off and recall to be presumptively unlawful, but not unlawful on its face. However, *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406 (1983), *enforced sub. nom. Local 900, International Union of Electrical Workers v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984), determined that super seniority to union officers without regard to whether they performed on-the-job contract administration functions was unlawful and not presumptively unlawful. In light of *Gulton*, *Auto Warehousers* is no longer persuasive. *See NLRB v. Local 1131*, 777 F.2d 1131, 1140 (6th Cir. 1985).

In *Great Lakes Carbon Corporation v. NLRB*, 360 F.2d 19 (4th Cir. 1966), we decided that a super seniority plan favoring employees who worked during a strike was unlawful on its face and that the action was not barred by the six month limitation of § 10(b). With the super seniority plan being unlawful on its face, there was no need to consider the circumstances surrounding the creation of the plan, which circumstances admittedly took place more than six months before the action was brought. *See id.* at 21-22.

Since the Ensign Electric Local 5925 contract grants super seniority to union officials solely because of their status as union officials, this provision is unlawful on

its face. Thus, no evidence outside the terms of the contract is required to prove the unfair labor practice, and § 10(b) does not apply.

As to all other issues, our views remain as expressed in our opinion decided July 22, 1985 and found in 767 F.2d 1100.

ENFORCEMENT GRANTED.

HAYNSWORTH, Senior Circuit Judge, dissenting:

I adhere to my view expressed in dissent when this case was before us earlier, *see* 767 F.2d at 1103 *et seq.*, that *Gulton* should not be applied retroactively to make exercise of these super-seniority rights unlawful. Should I agree with my brothers on that score, however, I could not agree that the contract was unlawful on its face.

At the time the successive contracts were negotiated and executed and at the time of the layoffs, there was no relevant precedent holding such super-seniority provisions unlawful. Though the members of the National Labor Relations Board were divided on the subject, such precedents as there were supported the legality of the super-seniority clause.

Moreover, even after *Gulton*, the super-seniority provision is not unlawful on its face unless one knows or assumes that it extends super-seniority to one or more union officials who have no on-the-job responsibilities for contract administration. Thus I think that, if *Gulton* is to be applied retroactively, the six month limitations period is triggered by an actual layoff based upon a claim of super-seniority by a union official having no on-the-job responsibility for contract administration.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Caption Omitted in Printing]

JUDGMENT

[Filed Feb. 19, 1986]

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement of an order issued by it against Respondent, on January 25, 1984, in proceedings before the said Board known upon its records as case no. 9-ca-15824, et al, and upon the certified record and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the enforcement be and is hereby granted.

/s/ John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Caption Omitted in Printing]

ORDER

[Filed Apr. 1, 1986]

The respondents' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Murnaghan and Judge Haynsworth.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX E

NATIONAL LABOR RELATIONS BOARD

Cases 9-CA-15824, 9-CA-16722, 9-CB-4698, and 9-CB-4892

ENSIGN ELECTRIC, DIVISION of HARVEY HUBBLE, INCORPORATED *and* DAVID R. RICE

UNITED STEELWORKERS OF AMERICA, LOCAL 5925, AFL-CIO-CLC *and* DAVID R. RICE

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25 January 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 9 September 1981 Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent Employer and Respondent Union, respectively, filed cross-exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The provision in dispute is contained within the collective-bargaining agreement between the Respondents and provides for superseniority for "The local union president, vice-president, recording secretary, financial secretary and treasurer and grievance committee . . . and union stewards in the event of a layoff." The parties stipulated that the positions of recording secretary, financial secretary, and treasurer are not directly involved in the processing of grievances. However, the judge found that they performed vital and meaningful duties which were sufficiently related to the Union's ultimate goal of maintaining an effective relationship between the Respondents.[1] Therefore, he determined that Respondent Employer and Respondent Union had not unlawfully maintained and enforced a superseniority provision in their collective-bargaining agreement which granted preferential seniority for purpose of layoff to Recording Secretary George McCoy and Treasurer Douglas Jarrell.[2] Thus, the judge, relying on *Dairylea Cooperative*[3] and *Electrical Workers UE Local 623 (Limpco Mfg.)*,[4] concluded that the complaint was without merit and should be dismissed.

The General Counsel contends that the functions performed by the recording secretary, financial secretary, and treasurer relate solely to the internal administrative

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[1] For a more detailed discussion, see the judge's decision under the heading "The Union."

[2] We adopt the judge's finding that Financial Secretary Valkie Fetty had sufficient "natural or earned seniority" which exceeded that of employees laid off between March 1980 and April 1981 and that there was no invoking of the superseniority clause as to him. Accordingly, we shall dismiss the complaint allegations regarding Fetty.

[3] 219 NLRM 656 (1975), enfd. sub nom. *Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976).

[4] 230 NLRB 406 (1977), enfd. sub nom. *Anna M. D'Amico v. NLRB*, 582 F.2d 820 (3d Cir. 1978).

concerns and needs of the Union and only indirectly relate to the representative of unit employees. The exceptions also emphasize that these administrative functions are not performed on the job, during working hours, but instead are performed at their respective homes.

In *Gulton Electro-Voice*,[5] the Board recently reexamined the issue of superseniority for union officials and overruled *Limpco*, above, and its progeny.[6] While superseniority benefits limited to layoff and recall still may be accorded to stewards, no superseniority benefits at all may be extended to union officials who, like the officers in this case who received superseniority, are not involved in grievance processing or other on-the-job contract administration or steward-like duties.[7] Thus, we find merit to the exceptions as applied to the recording secretary and treasurer. Accordingly, we find that, by maintaining and enforcing the superseniority clause with respect to the recording secretary and treasurer during Respondent Employer's March 1980 to April 1981 layoff periods, Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act, and Respondent Employer has violated Section 8(a)(1) and (3) of the Act.[8] Furthermore, by

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[5] 266 NLRB 406 (1983).

[6] *Otis Elevator Co.*, 231 NLRB 1128 (1977); *American Can Co. (I)*, 235 NLRB 704 (1978); *American Can Co. (II)*, 244 NLRB 736 (1979), enfd. 648 F.2d 746 (10th Cir. 1981).

[7] We agree with the General Counsel's contention that the participation of these officers on the Union's executive board where grievances may be discussed and/or processed is not in the nature of on-the-job steward-like or contract administration functions because these activities do not take place at the plant site or during working hours. *McQuay-Norris*, 258 NLRB 1397 (1981). See also *Automobile Workers Local 501 (Bell Aerospace Textron)*, 267 NLRB 154 (1983).

[8] In their exceptions, the Respondents contend that the allegations of the complaint are barred by the operation of the 6-month limitation proviso to Sec. 10(b) of the Act. Contrary to their assertions, the consolidated complaint does not attack the execution of

according Recording Secretary McCoy and Treasurer Jarrell superseniority under the disputed clause with respect to layoffs on various dates between March 1980 and April 1981, and thereby affecting employees who would not have been affected if the collective-bargaining agreement had not accorded them superseniority, Respondent Employer discriminated against employees in violation of Section 8(a)(1) and (3) of the Act, and Respondent Union thereby violated Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. Ensign Electric, Division of Harvey Hubble, Incorporated, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, Local 5925, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing a seniority clause in their collective-bargaining agreement according Respondent Union's recording secretary and treasurer superseniority, Respondent Employer and Respondent Union have engaged in, and are engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the Act, respectively, and by discriminating against unit employees, including employees David Rice, Raymond Soward, Paul Sansom,

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the contract nor does it relate to when the officers were elected and took office. Instead, only the Respondents' maintenance and enforcement of its superseniority clause within the applicable 10(b) period is in issue. It is well established that each act or incident of such enforcement constitutes a reaffirmance or renewed entering into of the superseniority clause. Accordingly, we find the Respondents' exceptions lacking in merit. *Automobile Workers Local 561 (Scovill)*, 266 NLRB 952 (1983); *Actors' Equity Assn.*, 247 NLRB 1193 (1980), enfd. 644 F.2d 939 (2d Cir. 1981); *Connecticut Limousine Service*, 235 NLRB 1350 (1978), enfd. in part sub nom. *NLRB v. Teamsters Local 443*, 600 F.2d 411 (2d Cir. 1979).

Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joney Watts, and others, when Respondent Employer laid off employees who would not have been affected if the collective-bargaining agreement had not accorded the recording secretary and treasurer superseniority, the Respondent engaged in further violations of the aforesaid sections of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except as described above, the Respondents have not otherwise violated the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that the superseniority clause here in dispute is unlawful and we shall therefore order that Respondent Union cease and desist from maintaining and enforcing such clause in its bargaining agreement with Respondent Employer with respect to Respondent Union's recording secretary and treasurer. We shall also order that Respondent Employer cease and desist from maintaining and enforcing such clause in its bargaining agreement with Respondent Union. We have also found that the unlawful superseniority clause was so applied as to lay off employees David Rice, Raymond Soward, Paul Sansom, Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joey Watts, and others between March 1980 and April 1981 who would not have been laid off but for the illegal discrimination depriving them of seniority. Consequently, we shall order that Respondent Employer offer to reinstate any employees, including those named above who would not have been laid

off but for the unlawful assignment of superseniority to the recording secretary and treasurer, and that the Respondents jointly and severally make affected unit employees whole for any loss of earnings they may have sustained as a result of the discrimination against them. We shall also order that Respondent Employer expunge from its files any reference to the unlawful layoffs, and shall notify the affected employees that this has been done and that the unlawful layoffs will not be used as a basis for future personnel actions against them. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). Also, in order to remedy in full the effects of Respondent Union's unlawful conduct, we shall order Respondent Union to notify Respondent Employer and all affected employees, including those named supra, that it does not object to their reinstatement to the positions they held prior to the enforcement of the superseniority clause against them. Also, in order to remedy in full the effects of the Respondents unlawful conduct, Respondent Employer's backpay obligation shall run from the effective date of the discrimination against the affected unit employees to the time it makes such recall offers, while Respondent Union's obligation shall run from such effective date to 5 days after the date of its notification to Respondent Employer that it has no objection to the recall of unit employees affected by the unlawful grant of superseniority to union officers. Finally, we shall order that Respondent Employer cease and desist in any like or related manner from interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act, and that Respondent Union likewise cease and desist from restraining or coercing employees it represents exercising those same rights.

ORDER.

The National Labor Relations Board orders that

A. Respondent Employer, Ensign Electric, Division of Harvey Hubble, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a collective-bargaining provision with Respondent Union, United Steelworkers of America, Local 5925, AFL-CIO-CLC, according the Union's recording secretary and treasurer superseniority.

(b) Discriminating against any employees, including employees David Rice, Raymond Soward, Paul Sansom, Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joney Watts, and others, when such employees have greater seniority in terms of length of employment than has one of the aforementioned union officials.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Union make any unit employees, including those named above, whole for any loss of earnings they may have suffered as a result of the discrimination against them, such earnings to be determined in the manner set forth in the section of this Decision entitled "The Remedy," and offer to reinstate any employee who would not have been laid off but for the unlawful assignment of superseniority to the recording secretary and treasurer.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-

cards, personnel records and reports, and all other records necessary to analyze the amount of backpay and the route assignment due under the terms of this Order.

(c) Expunge from its files any reference to the layoff of any employees affected by the superseniority as applied to the Union's recording secretary and treasurer from March 1980 to April 1981, and notify them in writing that this has been done and that evidence of the unlawful layoff will not be used as a basis for future personnel actions against them.

(d) Post at its establishment in Huntington, West Virginia, copies of the attached notice marked "Appendix A."[9] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent Employer's representative, shall be posted by Respondent Employer, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Post as the same places and under the same conditions as set forth in paragraph A,2,(d), above, as soon as forwarded by said Regional Director, copies of the attached notice marked "Appendix B."

(f) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for Region 9 for posting by Respondent Union.

(g) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent Employer has taken to comply herewith.

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[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

B. Respondent Union, United Steelworkers of America, Local 5925, AFL-CIO-CLC, Huntington, West Virginia, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining, enforcing, or otherwise giving effect to those clauses in its collective-bargaining agreement with Respondent Employer, Ensign Electric, Division of Harvey Hubble, Incorporated, according the Union's recording secretary and treasurer superseniority with respect to layoff and recall.

(b) Causing or attempting to cause Respondent Employer to discriminate against employees in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner restraining or coercing employees of Respondent Employer in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Employer make any unit employees, including those named above, whole for any loss of earnings they may have suffered by reason of the discrimination against them, such lost earnings to be determined in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify Respondent Employer and all affected employees in writing that it has no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off or reassigned.

(c) Post at its office and meeting halls used by or frequented by its members and employees it represents at Respondent Employer's Huntington, West Virginia, facility copies of the attached notice marked "Appendix B."[10] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed

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[10] See fn. 9, above.

by Respondent Union's representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Union to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Post at the same places and under the same conditions as set forth in paragraph B,2,(c), above, as soon as forwarded by said Regional Director, copies of the attached notice marked "Appendix A."

(e) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for Region 9 for posting by Respondent Employer.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

APPENDIX A

[To NLRB Order]

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT maintain and enforce any clause in our collective-bargaining agreement with United Steelworkers of America, Local 5925, AFL-CIO-CLC, according the Union's recording secretary and treasurer superseniority with respect to layoff.

WE WILL NOT discriminate against any employees by laying them off instead of the Union's recording secretary and treasurer when the Union's recording secretary and treasurer do not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to David Rice, Raymond Soward, Paul Sansom, Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joney Watts, and other affected employees to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to them and others who were discriminatorily laid off instead of the Union's recording secretary and treasurer.

WE WILL expunge from our files any reference to the layoff of any employees affected by the superseniority as applied to the Union's recording secretary and treasurer for the March 1980 to April 1981 layoffs, and WE WILL notify them in writing that this has been done and that evidence of the unlawful layoff will not be used as a basis for future personnel actions against them.

WE WILL jointly and severally with the Union make those employees named above and any other unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

ENSIGN ELECTRIC, DIVISION OF
HARVEY HUBBLE, INCORPORATED

APPENDIX B
[To NLRB Order]

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT maintain and enforce any clause in our collective-bargaining agreements with Ensign Electric, Division of Harvey Hubble, Incorporated, according the

recording secretary and treasurer superseniority with respect to layoff.

WE WILL NOT cause or attempt to cause Ensign Electric, Division of Harvey Hubble, Incorporated, to discriminate against any employees by requiring that the collective-bargaining agreement be enforced so as to lay them off instead of the recording secretary and treasurer when the recording secretary and treasurer do not in fact have top seniority in terms of length of employment.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights protected by Section 7 of the Act.

WE WILL notify both Ensign Electric, Division of Harvey Hubble, Incorporated, and employees David Rice, Raymond Soward, Paul Sansom, Charles Deal, Nelson Edmonds, Otho Mullins, Jimmy Nance, Clarence Copley, Joney Watts, and other affected employees that we have no objection to reinstating the affected unit employees who but for the unlawful assignment of superseniority would not have been laid off.

WE WILL jointly and severally with Ensign Electric, Division of Harvey Hubble, Incorporated, make any unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, with interest.

UNITED STEELWORKERS OF AMERICA, LOCAL 5925,
AFL-CIO-CLC

APPENDIX F

NATIONAL LABOR RELATIONS BOARD
DECISION OF ADMINISTRATIVE LAW JUDGE

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: These cases were heard in Huntington, West Virginia, on July 14, 1981, pursuant to charges filed and served and a consolidated complaint which issued on June 10, 1981.

The complaint alleges that Ensign Electric, Division of Harvey Hubble, Incorporated, herein the Respondent Employer, and United Steelworkers of America, Local 5925, AFL-CIO-CLC, herein the Respondent Union, have engaged in unfair labor practices in violation of Section 8(a)(1) and (3) and 8(b)(1)(A) of the Act. The Respondents filed answers denying the allegation of unlawful conduct set forth in the consolidated complaint.

Upon the entire record, the briefs submitted by all parties, and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, the Respondent Employer, a West Virginia corporation, has been engaged in the manufacture of electrical distribution equipment and component parts for the mining industry at its Huntington, West Virginia, facility. During the past 12 months, a representative period, the Respondent Employer, in the course and conduct of its business operations, purchased and received at its Huntington, West Virginia, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of West Virginia.

The Respondent Employer is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts and Background*

The essential facts are not in dispute. The Respondent Union represents employees employed by the Respondent Employer and has maintained a series of collective-bargaining agreements with the Respondent Employer over a period of many years. The most recent collective-bargaining agreement is effective from February 10, 1979, to October 1, 1981. Section 6-J of that agreement sets forth therein the following preferential seniority clause:

> The local union president, vice-president, recording secretary, treasurer and grievance committee shall have preferential seniority in the event of a layoff. Shop stewards shall have preferential seniority in their department and on their shift provided they can perform the work remaining.

A similar seniority preference clause, exclusive of seniority preference for stewards, had been maintained in 1970. The stewards' coverage was added thereafter.

In October 1978, there were, in total, about 340 employees at the Huntington plants. Between March 1979 and April 1981, extensive layoffs reduced the work force from 262 to 68 employees. These layoffs were effectuated pursuant to seniority and the seniority preference clause which was applied to prevent the layoff of stewards,

grievance committeemen, and union officers.[1] Financial Secretary Valkie Fetty and Vice President Lyle James have "natural or earned" seniority which exceeds that of the employees laid off between March 1980 and April 1981, as well as the earlier 1979 layoffs. Union President James Godfry, Treasurer Doug Jarrell, and Recording Secretary George McCoy escaped the layoffs because of the contractual seniority preference, i.e., the so-called superseniority.

The complaint alleges that the Respondents have violated the Act by, in or about February 1980, maintaining and applying the seniority preference clause to the recording secretary, financial secretary, and treasurer, "notwithstanding they are not involved in the processing of grievances or the direct administration of the contract." It is agreed that those three officers are not directly involved in the processing of grievances. The president and vice president are directly involved in grievance processing, and there is no allegation that application of superseniority to them is unlawful.

B. *The Union*

Jurisdiction of Local 5925 extends exclusively to the Respondent Employer's Huntington plants, where all employees are members and subject to the dues-checkoff provision in the union contract. Union officers are elected by secret-ballot election. According to the International's constitution, article VII, section 9(b), eligibility for election to the position of officer is conditioned upon employment at a plant or mill within the jurisdiction of the local union. It would appear that employment elsewhere would serve to disqualify an incumbent officer for reelection. The Local is governed by the provisions of the International Union's constitution, and bylaws for local

[1] Only 5 of a total of 11 union officers are covered by the seniority preference clause. There were 10 shop stewards and 4 grievance committee members.

unions, the latter of which grants enabling power to the local to enact supplementary rules. Local 5925 adopted its own bylaws, which, inter alia, set forth that between local general marketing meetings, the highest local authority shall be the local executive board consisting of the president, vice president, recording secretary, financial secretary, and treasurer.

The function and duties of the executive board includes monthly meetings and meetings on call of the president; evaluation and decision of matters to be addressed to the local membership at regular membership meetings; investigation, evaluation, and recommendation to the membership at regular meetings as to whether members should attend conferences, seminars and schools, many of which concern union grievance processing and contract administration; and, as occurred on one occasion in 1979, the evaluation and recommendation to the membership of a change in the collective-bargaining agreement that had been proposed by the Respondent Employer. All members of the executive board have equal decisional authority which is manifested by a vote upon issues presented.

The financial affairs of the Local are managed by the financial secretary, treasurer and, to a lesser extent, the president, pursuant to authority derived from the International constitution and guidelines set forth by the International Union in a detailed manual. They are responsible for all disbursements and receipts and maintenance of records of such disbursements and receipts, including dues. The Local's financial management encompasses such activities as the operation of a voucher system reimbursement by check of members for the expenses and loss of wages incurred by participation in union affairs, a voucher system for the purchase of local union property and supplies, a system for the dispensing of strike benefits, and a system for the payment of arbitration processing expenses.

The activities of the financial officers are subjected to various review procedures of the International Union. Elected local trustees audit the Local's books every 3 months, and International auditors periodically conduct their own audits of the local records. As any member can file charges or complaints, the International Union may conduct an audit at any time. The treasurer and financial secretary must be available for those audits. They must also be available for any investigation or inquiry by governmental agencies and are responsible for reports to government agencies. They are obliged to make reports to the local membership body. Written reports are signed by them. Through a system of internal checks and balances imposed by the International, the disbursement procedures require the participation of each financial officer.

Members' dues are forwarded to the Local Union from the employer pursuant to the checkoff system. The financial secretary deals directly with the Employer's assistant personnel director at the plant on matters concerning membership dues.

In addition to a general account, the financial officers maintain as a separate account, a strike benefit account. Each financial officer participates in the disbursement of strike benefits. The most recent strike occurred in 1978-1979 prior to the most recent contract and lasted 4½ months. Financial Secretary Fetty was chairman of the strike committee. He set up a special bank account and maintained records of all disbursements and receipts; at that time he was solely responsible. Strike benefit fund management is now shared by the financial secretary, treasurer, president, and a "staff man" who must execute all strike benefit checks. The fund is audited by the International Union.

All financial officers and the recording secretary are members of the executive board. The treasurer and financial secretary spend 50 hours and 20 hours a month in the execution of their duties and are each paid a stipend.

The recording secretary is responsible for the receipt at his home of all local union correspondence and maintenance of all such correspondence at the union hall, including arbitration summaries and newsletters, and the forwarding of all incoming correspondence to the proper destination, e.g., to the president, the grievance committee, etc. A file of arbitration summaries is maintained by him for use by stewards and grievance committeemen. He is unaided by any clerk or typists. He drafts all outgoing correspondence upon consultation with the president and executive board. The recording secretary maintains minutes of every monthly or special membership meeting. He maintains the monthly financial report. The International Union imposes on him certain duties regarding internal union elections. On occasions he had approached individual members on the jobsite, and elicited from them their interest in attending conferences and seminars, many of which pertain to grievance processing or contract administration. Like the financial secretary and treasurer, the recording secretary has occasionally been subjected to inquiries of members in the plant concerning their opinion of contract interpretation or grievances.

The recording secretary spends 15 to 20 hours a month on his duties as an officer and receives a stipend.

C. *Analysis*

By majority opinion, the Board held in *Dairylea Cooperative*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), that seniority preference which effectuated the job retention of stewards during layoffs to the detriment of employees with greater "earned" or "natural" seniority was lawful because the representational function of the steward in the plant served the greater common good of all unit employees by furthering the effective administration of bargaining agreements on the plant level. However, the Board held that because of the "inherent

tendency of super seniority clauses to discriminate against employees for union-related reasons," such clauses not limited to layoff and recall are presumptively unlawful and that the party asserting their legality must assume the burden of establishing justification.

In *Electrical Workers UE Local 623 (Limpco Mfg.)*, 230 NLRB 406 (1977), enfd. sub nom. *Anna M. D' Amico v. NLRB*, 582 F.2d 820, 824 (3d Cir. 1978), the Board was presented with the issue of whether seniority preference can validly be extended to union officers who may not possess "steward-type" functions. The Board majority rejected the view that superseniority in layoff situations is presumptively valid exclusively where the beneficiary is involved in grievance processing at the work place. The Board majority stated at 230 NLRB 406, 407-408:

> What is at stake is the effective and efficient representation of employees by their collective-bargaining representatives. Certainly, the representational activities carried out by union officials involved in the administration of the collective-bargaining agreement on behalf of employees extend beyond the narrow confines of grievance processing. These encompass at the very least a functioning local to assert the presence of the union on the job. The Act guarantees employees the right to be so represented through the collective-bargaining process. In fact, perhaps the most important union officer, the president, is usually not involved in grievance proceedings . . . we believe that, once it has been initially demonstrated that the official responsibilities of the union officer in question bear a direct relationship to their effective and efficient representation of unit employees, then their officer is entitled to the benefit of the same presumption afforded to union stewards.

The Board held that the union demonstrated that the union officer, the recording secretary, qualified for the

seniority preference by virtue of her role in the overall administration of the collective-bargaining agreement, and further stated that the General Counsel "continues to have the burden of proving affirmatively that the application of a superseniority provision to a functional union officer in a layoff situation is invalid." The Board noted, inter alia, that the recording secretary was a member of the executive board, was responsible for maintaining records of membership and executive board meetings, presented shop reports for absent stewards, handled all local correspondence, posted notices of membership meetings, procured material needed by stewards, aided stewards in obtaining reimbursement for lost time on the job due to union duties, and participated informally in the grievance process by aiding stewards in the writing of grievances and advising stewards on contract questions, helped formulate bargaining positions, scheduled pickets during a recent strike and handled money for pickets. Finally, it is noted that if the recording secretary were laid off and thereafter was employed by an employer not a party to the collective-bargaining agreement, she would have been required to resign from office. The Board stated at 230 NLRB at 408:

> It is evident that the official responsibilities of the recording secretary bear a direct relationship to the effective and efficient representation of unit employees both at the plant level and for the entire amalgamated local. Equally clear is the fact that the recording secretary participates informally in the processing of grievances.

In *Otis Elevator Co.*, 231 NLRB 1128 (1977), the Board held that superseniority for union officers (president, vice president, and executive board members) who acted as de facto stewards was justified. However, the Board stated (231 NLRB at 1129) in reference to its *Limpco* decisions:

> Thus, in *Limpco*, we approved superseniority for the recording secretary—not because of her informal participation in grievances—but because we found that her official responsibilities bore a "direct relationship to the effective and efficient representation of unit employees . . . ." Similarly, the officers here were entitled to superseniority because in their official capacities they contributed to the ability of the Union to represent the unit efficiently and effectively.

The Board majority concluded that the General Counsel failed to prove the invalidity of the application of superseniority to the aforesaid union officers.

In *Expedient Services*, 231 NLRB 938 (1977), a Board majority approved the application of seniority preference to a recording secretary where union officers served as stewards and also participated in contract negotiations, subsequent supplements and amendments, and supplied guidance and instruction to stewards. The Board stated (231 NLRB at 940): "There is, then, no affirmative showing that the functions of officers, even without regard to their simultaneous duties as stewards, do not relate in general to furthering the bargaining relationship."

In *Allied Industrial Workers Local 1486 (Allen Testproducts)*, 236 NLRB 1368 (1978), the Board majority adopted the administrative law judge's decision which found justifiable the application of superseniority for layoff purposes to the financial secretary of the union where that officer as part of her duties, inter alia, issued reports and checks to the International union; released funds for lost time reimbursement of employee members, attended executive board meetings where bargaining strategy, bargaining demands and grievance policies were discussed, but who had no direct responsibility in the processing of grievances; and who spent 2 or 3 hours a week on her union duties.

In the *American Can Co.*, 235 NLRB 704 (1978), the Board noted that superseniority was afforded to certain

union officers, including, inter alia, a guard, the duties of whom were described in the Union's constitution as something in the nature of a sergeant-of-arms and a trustee of whom the constitution gave "charge of the union hall" and union property. Citing the *Limpco* and *Otis Elevator* cases, the Board majority found the contractual superseniority clause presumptively lawful and noted 235 NLRB at 704 and 705:

> A documentary description of officers' duties showing no visible or direct impact by them on contract administration is insufficient evidence to overcome the presumption and to establish a violation of the Act. The Board will not, on the basis of such evidence, second-guess a union's decision as to what officers aid the union in effectively representing the unit. Thus, the parties to a collective-bargaining agreement do not have to justify application of superseniority to union officers, but, in order to establish a violation, the General Counsel must prove that a particular application is invalid.

The Board majority concluded that the General Counsel did not sustain the burden of proof and it therefore dismissed the complaint. Subsequently, the Board withdrew its order and reopened the proceeding to reconsider its decision because of the subsequent issuance by the Third Circuit of *Ana M. D'Amico v. NLRB*, supra.

The Court (582 F.2d 820 at 825) therein stated:

> It is evident . . . that the true rationale for validating a superseniority provision is found in the important function served by the recipient of superseniority in providing continuity of representation in carrying out the objectives of a collective bargaining agreement. Thus, those who, like union stewards, assist in resolving grievances on-the-spot are in a special way fulfilling an essential purpose of collective bargaining, i.e., adjusting grievances at their source.

However, with respect to the application of seniority preference for a recording secretary, the Court stated (582 F.2d at 835):

> Given the strong neutrality policy [Section 8 of the Act], we think that under *Great Dane Trailers* [388 U.S. 26 (1967)], the burden should be on the Union to justify the application of the provision to a recording secretary whose official duties in no way involved her in the collective bargaining process. . . . Furthermore we read the Board decision as requiring the Union to show that the Recording Secretary, as part of her official responsibilities and not merely as a volunteer, performed services which directly assisted in implementing the collective bargaining agreement. We take this to mean that the Union was obligated to produce credible proof that the individual in question was officially assigned duties which helped to implement the collective bargaining agreement in a meaningful way.

In reviewing the underlying facts, the Court stated that several of the duties of the recording secretary furthered the collective-bargaining interests of the bargaining unit, and noted, for example, the informal processing of grievances, the participation in formulating bargaining ideas, the scheduling of pickets during a recent strike and handling of money for pickets.

In reconsidering its decision in *American Can Co. (II)*, 244 NLRB 736, 737 (1979), the Board majority noted the divergence of opinion of Board Members with respect to the seniority preference issue. It characterized its Supplemental Decision and Order "based upon an aggregate majority" as follows:

> Chairman Fanning and Member Truesdale do not agree with the restrictions placed on superseniority by *Dairylea* and its progeny (see their dissent herein); Members Jenkins and Penello would not

> permit union officers to benefit from superseniority except when the officers also serve as stewards or otherwise engage in administration of the contract at the place and during the hours of their employment (see their concurrence herein); and Member Murphy adheres to *Dairylea* and *Limpco, supra,* but finds that the General Counsel has rebutted the presumption that the union officers here involved were lawfully afforded superseniority by showing that [the trustee and guard] are not engaged in contract administration (see her separate concurrence herein).[2]

In their brief in this case, counsels for the General Counsel state:

> At issue in this case is the application of the Board's decision in the *American Can Company,* . . . to a local union recording secretary, financial secretary and treasurer. In view of the unsettled state of the law regarding superseniority for union officers it is impossible at this time to point to any conclusive test by which a particular superseniority clause or its application may be judged. The widely divergent views of the Board members in *American Can* cast little light on the legality of the application of superseniority to the officers at issue in the instant case; however, counsels for the General Counsel believe that a close review of *American Can* and prior decisions, in view of their underlying rationale, supports the position that Respondent violated the Act by granting superseniority to those officers.

The General Counsel argues that the duties of the three officers in issue herein are not only unrelated to the grievance procedure but they are not directly related to the administration of the collective-bargaining agreement.

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[2] Member Murphy concluded in her concurrence that the dues of the trustee and guard were "too remote" and unrelated to the "general furthering of the bargaining relationship."

The General Counsel characterizes the duties of these three officers as related wholly to the internal administration of the union which it divorces from the furtherance and maintenance of the collective-bargaining relationship. Furthermore, the General Counsel argues that in any event there is no necessity for the continued employment in order for those officers to fulfill their duties, i.e., they can as easily function from their houses if need be.

The Respondent Employer and the Respondent Union argue that *Dairylea*, *Limpco*, *Otis Elevator*, and other cases cited above have not been overruled by the Board, and that under the rationale of those cases the extension of superseniority to the three officers involved herein is fully justified in that those three officers do participate in the administration of the collective-bargaining agreement by virtue of the necessity of their functions to effectuate efficient representation of unit employees, to maintain viability of the collective-bargaining relationship, and to maintain a continuity of representation. They contend that the General Counsel takes an unjustifiably restrictive and unrealistic view of what constitutes "contract administration." As the Respondent Union argues in its brief:

> It should be obvious that a functioning local union is functionally integrated within the concept of effective bargaining. If dues are not collected, the union eventually dies; if membership records are not maintained, membership affairs cannot be conducted and if bills are not paid, arbitrators cease taking assignments or worse, the local union membership who maintain grievance records are no longer available.
>
> It is simply improper and impossible to segregate local union administration from collective bargaining functions.

I am in agreement with what appears to be the consensus of all parties herein that the Board has not overruled its prior decisions with regard to the basic rationale of justifiable seniority preference for union officers in layoff

situations. The *American Can* case provided a forum for the reassertion of varying views of that rationale. However, I am constrained to apply what appears to be the unreversed Board precedent in the matter. The *American Can* case seems, at most, to have clouded the issue of which party has the burden of proof and which party must move forward with the evidence, in that it reevaluated its prior decision in that case upon an evaluation of the Tenth Circuit Court's conclusion that the Union is "obligated to produce credible proof that the [union officer] was officially assigned duties which helped to implement the collective bargaining agreement." Of the majority, only then Member Murphy explicitly referred to the burden of proof in concluding that the General Counsel satisfied that burden by adducing documentary evidence consisting of the union constitution which failed to disclose relevant duties. She seemed to suggest that the General Counsel must move forward with evidence that the union officer performs nonrelevant duties, but that the union must affirmatively prove duties that justify seniority preference.

Unlike the *American Can* decision, the Respondent Union and the Respondent Employer have elicited testimony and adduced evidence of meaningful and relevant official duties of the union officers. I conclude that the evidence of their duties satisfies the various criteria set forth by the Board in its prior decisions which justify the application of seniority preference to the financial secretary, treasurer, and recording secretary in layoff situations.

I am in agreement with the Respondents that prior Board decisions do not impose such a restrictive definition of "contract administration" as is urged by the General Counsel. I agree that seniority preference must be premised upon its ultimate objective, the maintenance of the collective-bargaining relationship by the effective administration of the contract. The justification for the

retention of stewards on the job at the plant during a layoff of other employees is the resulting continuity of representation and contract administration in the plant. With respect to union officers, the majority opinions of the Board hold that justification for their job retention is not to be judged by the criteria applied to stewards, i.e., the need for presence in the plant to process grievances. Rather, a broader view has been applied to union officers. The underlying concept to justify job retention of union officers is that argued by the Respondents, i.e., that it is unrealistic and impractical to divorce the Union's functional administration from contract administration where functional administration is necessary for the viability of effective and meaningful contract administration at the plant level. I agree with the Respondent's argument that layoff of the union officer, particularly in a situation of declining overall employment, is a threat to the continuity of effective representation and administration by experienced union officers. Turnover of functionally necessary union officers can only be disruptive to the bargaining relationship. A union officer who has found employment elsewhere is barred from seeking re-election. If he is employed elsewhere, his prime loyalty and interest will turn to his new employment and new coworkers even if he does not choose to resign. Moreover, it is unrealistic to expect that union officer having been laid off during a continuing downward employment spiral will continue to serve as effectively and attentively to their duties even if they have not as yet found other employment. Even though officers might be able to perform functionally necessary duties outside the work place, their presence and accessibility on the jobsite enhances the Union's presence. Their continued presence on the job insures a continued awareness by them of current conditions of employment of their members that enables them to intelligently cope with problems that arise and to which they must address themselves in their official capacity. Thus, for example, executive board members having firsthand,

continuing experience of job, production, or personnel problems can intelligently evaluate employer proposals to amend, modify, or suspend application of terms of the collective-bargaining agreement, and can intelligently address the membership on such issues.

The evidence herein demonstrates that all three officers herein, as executive board members and in their individual capacities, perform administration functions that are directly related to the vital day-to-day functioning of the local union, e.g., the maintenance of an orderly financial system and the ability of the local union to effectively communicate with its members and with other entities. The maintenance of a strike fund, for example, is of utmost importance to the Union's effective role in the bargaining relationship as is the ability to draw upon the resource of a strike committee chairman. The education of its members in areas of grievance procedure and contract administration is manifestly directly related to the ability of the Union to effectively represent employees at the plant level. The union officers' role in ascertaining and effectuating that education and the selection of the appropriate recipient of such education by external as well as internal communication on the job is as vital to that object, if not more so, as is the receipt of such education by a particular member. The dissemination of resource materials to the stewards, and the maintenance of an orderly file of such material, manifestly aids the stewards in their grievance processing effectiveness. The ability to pay for arbitration costs is of paramount importance.

I conclude that the duties of the recording secretary, financial secretary, and treasurer, including their duties as members of the executive board, constitute vital, meaningful duties which are sufficiently related to the ultimate objective, the maintenance of an effective bargaining relationship by the implementation of the collective-bargaining agreement, to justify the application of a seniority

preference to their positions in the context of facts in this case. Accordingly, I find that the complaint is without merit and ought to be dismissed.

D. *The 10(b) Issue*

The Respondent Union at the hearing, and the Respondent Employer in its brief, raises the affirmative defense that the underlying charge is untimely filed under Section 10(b) of the Act.[3]

The Respondent Union argues, inter alia, that since the first application of superseniority occurred in 1979 the charge is untimely. In view of my conclusion that the complaint lacks merit it is unnecessary to engage in a discussion of this issue, other than to conclude that Respondent's position, although in accord with the opinion of the Fifth Circuit Court of Appeals, is contrary to Board precedent. *Auto Warehousers*, 227 NLRB 628, 633-634 (1976), enf. denied 571 F.2d 860 (5th Cir. 1978).

[Recommended Order for dismissal omitted from publication.]

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[3] Sec. 10(b) of the Act provides in relevant part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ."

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-995

ENSIGN ELECTRIC DIVISION OF
HARVEY HUBBLE, INC., *et al.*,
Applicants,

v.

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 28, 1986.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 25th day of June, 1986.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-995

ENSIGN ELECTRIC DIVISION OF HARVEY HUBBLE, INC., *et al.*,

Applicants,

v.

NATIONAL LABOR RELATIONS BOARD

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and this same is hereby, further extended to and including August 29, 1986.

/s/ William J. Brennan, Jr.
Justice of the United States

Dated this 23 day of July, 1986.

Supreme Court, U.S.
FILED
NOV 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-334

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1986

ENSIGN ELECTRIC DIVISION OF HARVEY HUBBLE INCORPORATED AND UNITED STEELWORKERS OF AMERICA, LOCAL 5925, AFL-CIO-CLC, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Assuming the question is properly presented, whether the court of appeals erred in sustaining the National Labor Relations Board's retroactive application of its decision in *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406 (1983), which holds that preferential seniority may not lawfully be extended to union officials who are not involved in grievance processing or other similar on-the-job contract administration duties.

2. Whether bargaining unit employees waive their statutory right to be free of discrimination that encourages union membership by ratifying a collective bargaining agreement which grants superseniority for purposes of layoff to union officers who have no grievance handling or contract administration duties.

3. Whether Section 10(b) of the Act, 29 U.S.C. 160(b), precludes the Board from holding unlawful the enforcement of a superseniority provision that was executed and first implemented more than six months prior to the filing of an unfair labor practice charge.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-334

ENSIGN ELECTRIC DIVISION OF HARVEY HUBBLE INCORPORATED AND UNITED STEELWORKERS OF AMERICA, LOCAL 5925, AFL-CIO-CLC, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 767 F.2d 1100. The decision of the court of appeals on rehearing (Pet. App. 9a-14a) is reported at 783 F.2d 1121. The decision and order of the National Labor Relations Board (Pet. App. 17a-28a) are reported at 268 N.L.R.B. 620.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on February 19, 1986. A petition for rehearing and suggestion for rehearing en banc was denied on April 1, 1986 (Pet. App. 16a). On June 25, 1986, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including July 28, 1986 (Pet. App. 46a). On July 23, 1986, Justice Brennan further extended the time for filing a petition for a writ of certiorari to and including August 29, 1986 (Pet. App. 47a). The petition for a writ of certiorari was filed on August 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, United Steelworkers of America, Local 5925, AFL-CIO-CLC, has negotiated collective bargaining agreements on behalf of the employees of petitioner, Ensign Electric Division of Harvey Hubble Incorporated (Ensign Electric), for many years. Pet. App. 30a. These agreements traditionally have required that Ensign Electric lay off employees with the least seniority whenever reductions-in-force are necessary. *Id.* at 30a-31a. Since 1970, however, the agreements have also provided that the "local union president, vice-president, recording secretary, treasurer, and grievance committee shall have preferential seniority in the event of layoff." *Id.* at 30a. Thus, when Ensign Electric had to lay off a large number of its employees between March 1979 and April 1981, the extant collective bargaining agreement (effective February 10, 1979 to October 1, 1981) required Ensign Electric to retain the union's president, recording secretary, and treasurer, even

though these employees had less "natural or earned" seniority than other employees being laid off at the time. *Id.* at 30a-31a. Of these three union officers, only the union president had on-the-job contract administration or grievance processing responsibilities. *Id.* at 31a-34a.

2. One of the employees laid off during the March 1979-April 1981 period subsequently filed an unfair labor practice charge with the National Labor Relations Board (Board),[1] claiming that the preferential seniority clause in effect at the time of his layoff was unlawful. Pet. App. 10a. The Board agreed. *Id.* at 17a-28a. It found that Ensign Electric had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), and that the union had violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by "maintaining and enforcing the superseniority clause with respect to the recording secretary and treasurer during * * * [the] March 1980 to April 1981 layoff periods," and by laying off "employees who would not have been affected if the collective bargaining agreement had not accorded * * * [the recording secretary and treasurer] superseniority * * *." Pet. App. 19a-20a.

In so holding, the Board followed (Pet. App. 19a) its earlier decision in *Gulton Electro-Voice, Inc.*, 266

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[1] The employee filed this charge on September 15, 1980, over 12 months after the preferential seniority clause of the February 10, 1979 agreement was first exercised on August 31, 1979. Pet. App. 10a. The Board's General Counsel issued a complaint on November 4, 1980 concerning this charge. *Ibid.* The General Counsel, however, amended his complaint on June 10, 1981, to cover the claims of employees laid off at the time the union's treasurer exercised his right to preferential seniority on April 10, 1981. *Ibid.*

N.L.R.B. 406 (1983), enforced *sub nom. Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d F.2d 1184 (D.C. Cir. 1984). The *Gulton* decision, which overruled the Board's prior decision in *United Electrical Workers, Local 623*, 230 N.L.R.B. 406 (1977), enforced *sub nom. D'Amico* v. *NLRB*, 582 F.2d 820 (3d Cir. 1978), had held that, while "[i]nsuring the enforcement of the collective bargaining agreement by retaining on the job union representatives responsible for processing grievances is a sufficiently compelling reason to allow limited superseniority with respect to layoff and recall to those who perform steward-like duties[,] * * * the stewards' need to maintain an on-the-job presence does not generally apply to officers [and] thus the justification used for stewards does not extend to officers generally—unless the latter perform steward-like duties." *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. at 408. Applying that rationale to the instant case, the Board found that the superseniority clause in petitioners' collective bargaining agreement was unlawful because it did not limit layoff and recall protection to union officers with on-the-job contract administration or grievance handling responsibilities. Pet. App. 19a-20a.

The Board also rejected petitioners' claim that the "6-month limitation proviso to Sec[tion] 10(b) of the Act" immunized this superseniority clause from the Board's scrutiny. Pet. App. 19a-20a & n.8. Though the clause had been ratified and first implemented more than six months before the filing of the unfair labor practice charge (*ibid.*), the Board found that "the consolidated complaint does not attack the execution of the contract * * *" (*ibid.*), but rather "only the * * * maintenance and enforcement of [the] superseniority clause within the applicable [six-month]

period * * *." *Ibid.* Accordingly, the Board found petitioners' "exceptions lacking in merit" (*ibid.*) and ordered, inter alia, that Ensign Electric reinstate the individuals who had been laid off between March 17, 1980, the date on which the six-month period commenced, and April 10, 1981, the date on which lay-offs ceased, and that petitioners jointly and severally make those individuals whole for any resultant loss of earnings. *Id.* at 21a-23a, 25a.

3. The court of appeals upheld the Board's decision and enforced its order. Pet. App. 1a-8a. It sustained the Board's retroactive application of the *Gulton* decision (*id.* at 2a-5a & nn.1, 2), holding that the "considerations governing retroactivity" of judicial and administrative decisions are "strikingly similar" (*id.* at 4a n.1, citing *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), and *Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972)), and that, because "[t]he question of the extent to which functional union officials [may] be insulated from lay-off in preference to rank and file union members had been debated in a number of cases with vocal dissents[,] * * * it could not * * * be[] said that the law was settled in such a way as to make unjust the retroactive application of *Gulton* in the instant case." Pet. App. 2a-4a (footnotes omitted). On rehearing, the court rejected petitioners' claim that the six-month statute of limitations provision rendered the preferential seniority clause of the February 10, 1979 agreement immune from challenge. *Id.* at 9a-14a. The court reasoned that, "[s]ince the Ensign Electric * * * contract grants super seniority [*sic*] to union officials solely because of their status as union officials, [it] is unlawful on its face [and] no evidence outside the terms of the

contract is required to prove the unfair labor practice * * *." *Id.* at 13a-14a. In these circumstances, the court held, Section "10(b) [of the Act] does not apply." *Ibid.*

ARGUMENT

1. Petitioners first contend (Pet. 10-15) that the court below erred in sustaining the Board's retroactive application of the *Gulton* rule. They do not dispute (*id.* at 10-11 & n.9) that other courts of appeals have analyzed and decided the retroactivity question exactly as the court below did. See, *e.g.*, *NLRB* v. *Wayne Transp., A Div. of Wayne Corp.*, 776 F.2d 745, 750-751 (7th Cir. 1985); *NLRB* v. *Niagara Machine & Tool Works*, 746 F.2d 143, 151 (2d Cir. 1984); *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d 1184, 1186-1189 (D.C. Cir. 1984). Rather, petitioners contend (Pet. 11-15) that the "balancing test" that these courts have employed—which weighs the statutory interest in retroactive application against the surprise and hardship that will result—is inappropriate where, as here, the Board's new rule is only a "permissible," and not a "mandatory," construction of the Act. This contention is not properly presented to this Court for review and, in any event, is in error.

The contention is not open to review by this Court because petitioners have not complied with the requirement set forth in Section 10(e) of the Act for obtaining judicial review. Section 10(e) provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court,

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[2] Judge Haynsworth dissented as to the retroactivity and limitations period issues. Pet. App. 6a-8a, 14a.

unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e). "This Court has interpreted [Section] 10(e) to mean that a Court of Appeals is 'without jurisdiction to consider' an issue not raised before the Board if the failure to do so is not excused by extraordinary circumstances." *EEOC* v. *FLRA*, No. 84-1728 (Apr. 29, 1986), slip op. 4. Indeed, the Court has held that Section 10(e)'s requirements apply even where the Board has raised an issue for the first time in its own decision; in these circumstances, Section 10(e) requires that the objecting party timely present its objections to the Board in a petition for reconsideration or rehearing. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982); *Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Therefore, since petitioners have never presented to the Board their argument against retroactive application of the *Gulton* rule, the court below lacked jurisdiction to consider that argument, and this Court does as well.[3]

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[3] Although the Board briefed and argued the Section 10(e) issue in the court below (see Br. 30-31 (filed Dec. 13, 1984)), the court decided the *Gulton* retroactivity question without addressing the Section 10(e) issue. See Pet. App. 2a-5a.

Two other courts of appeals have explicitly determined that Section 10(e) does not bar courts from determining whether the *Gulton* decision applies retroactively. See *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1191-1194; *NLRB* v. *Wayne Transp., a Div. of Wayne Corp.*, 776 F.2d at 748-750. These courts found that, because the Board may have reason to be aware that unions will object to retroactive application of the *Gulton* rule, Section 10(e)'s policies do not re-

Furthermore, the petition for certiorari raises for the first time in this case the claim that a discretionary construction of the Act may never be applied retroactively. In the court below, petitioners urged only that the surprise and hardship to Ensign Electric and the Union outweighed the statutory interest in retroactive application of the *Gulton* rule; petitioners did not argue below that retroactive application of the *Gulton* rule was *per se* improper because the *Gulton* rule reflects an exercise of discretionary authority by the Board. Petitioners should not be permitted to raise this argument for the first time in this Court. See *EEOC* v. *FLRA*, slip op. 5; *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Youakim* v. *Miller*, 425 U.S. 231, 234-235 n.5 (1976).

In any event, there is no merit to petitioners' argument (Pet. 11 (emphasis in original)) that "a balancing test" for retroactive application of a new rule is appropriate only where "a statute is suscep-

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quire a bar to judicial review. This reasoning, however, does not suffice to remove Section 10(e)'s *jurisdictional* barrier.

Moreover, Section 10(e) requires that parties present the Board with both their objections and their reasons for maintaining these objections. It does so in order that the Board may "bring[] its expertise to bear on the resolution of [the] issues" and efficiently reach fair and informed decisions. *EEOC* v. *FLRA*, slip op. 4. As noted in the text, this requirement applies even where the Board has already issued a holding concerning a particular matter; the objecting party must still file a petition for reconsideration or rehearing with the Board to satisfy the restrictions that Section 10(e) places on the jurisdiction of the courts. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. at 666. The policies underlying Section 10(e) remain applicable even when the Board knows that a party is likely to object to a particular resolution of an issue; the Board still needs to know the particular reasons for objection.

tible of only one 'correct' construction" and "the agency has previously construed the statute *erroneously* to declare the conduct unlawful," and not where "a statute is susceptible of two 'correct' constructions, and the agency switches from one such construction to the other." Petitioners cite no case holding that an agency interpretation of a statute may not be applied retroactively unless the interpretation is compelled.[4] Rather, as the courts of appeals that have considered the retroactivity of *Gulton* have uniformly concluded (see, in addition to the decision below, *NLRB* v. *Wayne Transp., A Div. of Wayne Corp.*, 776 F.2d at 750-751; *NLRB* v. *Niagara Machine & Tool Works*, 746 F.2d at 151; *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1186-1189), while the nature of the agency's decision may affect the interests to be balanced, the problem remains one of balancing the public's legitimate interest in having the prevailing interpretation of the statute apply retroactively, see generally *Retail, Wholesale & Department Store Union* v. *NLRB*, 466 F.2d at 390, against the hardship to the affected party.

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[4] The cases that petitioners do cite suggest, to the contrary, that the relevant interests are to be balanced. See *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) (emphasis added) (the "ill effect of the retroactive application of a new standard" must be "*balanced* against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles"); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (emphasis added) (the question is whether "the adverse consequences ensuing from such reliance *are so substantial* that the Board should be precluded from reconsidering the issue in an adjudicative proceeding"); *Heckler* v. *Community Health Services*, 467 U.S. 51, 60 n.12 (1984) (emphasis added) ("administrative agency may not apply a new rule retroactively when to do so would *unduly* intrude upon reasonable reliance interests").

2. Petitioners next contend (Pet. 15-17) that the bargaining unit employees waived their right to be free of the discriminatory superseniority clause when they ratified the collective bargaining agreement containing that clause. This contention is also without merit.

This Court has made clear that only "economic" rights may be waived in a collective bargaining agreement. See *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-706 (1983); *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325-326 (1974). Thus, while statutory rights in the economic sphere (such as the right to strike) may be waived by collective agreement (see *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279 (1956)), statutory rights that ensure "the premise of fair representation" are not subject to waiver. *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. at 705-706; see also *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 47-48 (1954). And, as petitioners concede (Pet. 16-17), every court of appeals to consider the issue has held that superseniority for union officials undermines rights that ensure "the premise of fair representation" and, accordingly, cannot be defended on the basis of waiver. See, *e.g.*, *Local 1384, UAW* v. *NLRB*, 756 F.2d 482, 494 (7th Cir. 1985); *NLRB* v. *Local 1131*, 777 F.2d 1131, 1139 (6th Cir. 1985); *NLRB* v. *Niagara Machine & Tool Works*, 746 F.2d at 150; *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1190.

These courts of appeals have clearly reached the correct conclusion. "The Board has declared superseniority for officers not involved in on-the-job administration of the collective bargaining agreement to be unlawful not because it impairs the natural seniority rights of employees but because it impairs

their right to be free of discrimination that encourages union activism." *Local 1384, UAW* v. *NLRB*, 756 F.2d at 494. "Superseniority presumably encourages employees to become active supporters of the incumbent union in the hope that their efforts will win them union office and, thereby, greater job security." *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1190. This is precisely the kind of coercive conduct that this Court has said cannot be justified by waiver. See *NLRB* v. *Magnavox Co.*, 415 U.S. at 325-326; *Radio Officers' Union* v. *NLRB*, 347 U.S. at 47-48. Petitioners' contention to the contrary (Pet. 16-17) finds no support in the case law.[5]

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[5] Petitioners' claim (Pet. 17) that there is an "apparent inconsistency" between the decisions of the courts of appeals and this Court's decision in *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983), is wide of the mark. In *Metropolitan Edison Co.*, the Court held that a union may waive the right of union officials to refrain from taking affirmative steps to end unlawful work stoppages because that right is "closely related to the economic decision a union makes when it waives its members' right to strike" (460 U.S. at 706). By its own terms, however, the decision in *Metropolitan Edison Co.* does not apply where noneconomic rights—such as the right to be free of discrimination that encourages union membership—are involved. See *id.* at 705-706; see also *Local 1384, UAW* v. *NLRB*, 756 F.2d at 494-495; *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1190.

Petitioners' suggestion (Pet. 17 n.17) that the Board's decision in *Gem City Ready Mix Co.*, 270 N.L.R.B. 1260 (1984), is inconsistent with its decision here is also erroneous. In *Gem City*, the Board held that a union, as part of the settlement of an economic strike, may waive the seniority rights of its supporters. These rights may be waived because the employees' interests "coincide," and do not "conflict," with the union's interests. *NLRB* v. *Niagara Machine & Tool Works*,

3. Finally, petitioners argue (Pet. 17-18) that the court below erred in holding that Section 10(b) of the Act does not preclude the Board from holding unlawful the enforcement of a superseniority provision that was executed and first implemented more than six months prior to the filing of an unfair labor practice charge. This argument is also in error.

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *" (29 U.S.C. 160(b)). This section plainly does not mean that, unless the first instance of unlawful conduct is challenged within six months, all later related unlawful actions are immunized from Board sanction. Here, the only conduct found unlawful—the maintenance and enforcement of the superseniority clause during the March 1980 to April 1981 layoff period—occurred during the six-month period preceding (and the seven-month period succeeding) the filing of the unfair labor practice charge. See Pet. App. 19a-20a & n.8. The Board did not hold unlawful either the execution of the contract or the first exercise of the superseniority clause. See *ibid.* Accordingly, since the contract was unlawful on its face (see page 13, *infra*), the court below clearly did not err in rejecting petitioners' claim that Section 10(b) barred any finding of liability in this case. See *Local Lodge No. 1424, IAM* v. *NLRB*, 362 U.S. 411, 422 n.14, 423 (1960); *NLRB* v. *Local 1131*, 777 F.2d at 1139-1140.

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746 F.2d at 150-151. By contrast, "[s]uperseniority [for union officials] serves the union's interest in encouraging employees to be 'good,' active union members" and directly conflicts with the employees' right to be free of such encouragement. *Id.* at 150. Thus, *Gem City* is consistent with the Board's position here.

Petitioners' claim (Pet. 18) that the decision below conflicts with the decision of the Fifth Circuit in *NLRB* v. *Auto Warehousers, Inc.*, 571 F.2d 860 (1978), is wrong. In *Auto Warehousers, Inc.*, the contract clause at issue was not unlawful on its face; although the clause purported to grant preferential seniority to stewards, the preference was not automatic, but rather depended upon a union's request and the employer's approval. These actions, which constituted the unlawful activity, occurred more than six months before the charge. 571 F.2d at 862-864. By contrast, the contract clause at issue here expressly discriminated against employees for "union related" reasons; under *Gulton*, it was unlawful on its face and constituted a continuing violation of the Act.[6] For that reason, the court below (see Pet. App. 13a) correctly found that the *Auto Warehousers, Inc.* decision is distinguishable.[7]

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[6] Contrary to petitioners' suggestion (Pet. 18), the preferential seniority clause is in fact "unlawful on its face." The clause "grants super seniority [*sic*] to union officials solely because of their status as union officials." Pet. App. 12a-13a. No inquiry into the union officers' duties is necessary in order to find this clause unlawful. Accord *NLRB* v. *Local 1131*, 777 F.2d at 1139, 1140. The clause is overinclusive on its face and thus infringes upon employees' right to refrain from union activities. See *International Harvester Co.*, 268 N.L.R.B. 966 (1984); *United States Steel Corp.*, 268 N.L.R.B. 1187 (1984). Accordingly, it is *per se* unlawful under *Gulton*. Pet. App. 12a-14a; accord, *NLRB* v. *Local 1131*, 777 F.2d at 1140 (reaching the same conclusion and distinguishing *Auto Warehousers, Inc.* on this basis).

[7] The court also pointed out (Pet. App. 13a) that preferential seniority clauses were only presumptively unlawful when the *Auto Warehousers, Inc.* case was decided. Under *Gulton*, of course, such clauses are *per se* unlawful whenever

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1986

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they do not, by their own terms, make the grant of preferential seniority dependent on the union officers' duties. See *NLRB* v. *Local 1131*, 777 F.2d at 1140.

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No. 86-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ENSIGN ELECTRIC DIVISION OF HARVEY HUBBELL INCORPORATED *and* UNITED STEELWORKERS OF AMERICA, LOCAL 5929, AFL-CIO-CLC,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. THE RETROACTIVITY ISSUE

A. The Board asserts that the courts, by reason of § 10(e) of the Act, 29 U.S.C. § 160(e), lack jurisdiction to consider petitioners' challenge to the Board's retroactive application of *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983). The Board's contention is wholly without merit. It was rejected *sub-silentio* by the court below (which decided the retroactivity issue on its mer-

its), and, as the Board acknowledges (Br. Opp. 7-8, n.3), it has been rejected in every post-*Gulton* case in which the Board has raised it.

Section 10(e) provides, in pertinent part:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

In two separate ways, petitioners satisfied this requirement of § 10(e).

First, as the briefs to the Board in this case were filed two years before *Gulton* was decided, the parties perforce could not in those briefs have expressly opposed retroactive application of the not-yet-decided *Gulton*. But immediately upon issuance of the Board's decision in this case, petitioner Ensign notified the Board's Regional Director that it objected to the Board's retroactive application of *Gulton*, and that it would not comply with the Board's remedial order predicated on that retroactivity. Petitioner urged that the Board accordingly not pursue its quest for retroactive relief.[1] Four months later, the Board filed its application in the court below seeking enforcement of the retroactive order.[2] That the Board did not desist in the face of petitioner's objection

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[1] Petitioner Ensign's communications to the Board's Regional Director were filed with the court below in response to the Board's invocation of § 10(e). The Board's decision in this case was issued on January 25, 1984, and was received by the parties in the mail a few days thereafter. Petitioner first notified the Board's Regional Director of its objection in a phone call on February 10, 1984, and confirmed its position in a letter mailed that day. In response to efforts by the Board's agents to dissuade it from that position and to secure voluntarily compliance, petitioner reiterated its position by phone call and letter on March 5, 1984.

[2] The Board's application for enforcement was filed in the Court of Appeals for the Fourth Circuit on June 25, 1984.

is hardly surprising, for the Board had already decided that it would defend retroactive application of *Gulton* in the appellate courts, and indeed had already prevailed on the propriety of such retroactive application in *Local 900, Intern. U. of Elec. v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984).[3]

By notifying the Board's Regional Director of its objection in this manner, petitioner complied with both the letter and the spirit of § 10(e). The objection was lodged with an "agent" of the Board (§ 10(e)) promptly after the issuance of the decision that provided the first occasion for assertion of the objection,[4] and by reason of that objection the Board was put on notice of the grounds that would be advanced in the appellate courts were it to seek enforcement of its order without adjustment. *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255-56 (1943); *May Stores Co. v. NLRB*, 326 U.S. 346, 386-87, n.5 (1946); *Local 900, supra*, 727 F.2d at 1191-92.

Second, even had petitioner Ensign not *expressly* objected to retroactive application of *Gulton* following issuance of the decision below, the briefs that petitioners had filed with the Board *initially* were sufficient to put the Board on notice that petitioners objected to the retroactive application of any new rule the Board might formulate. Those briefs, which defended the decision of the Administrative Law Judge, noted that the super-seniority

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[3] *Local 900* was decided on February 10, 1984, coincidentally the same day that petitioner advised the Board of its objection to retroactive application of *Gulton*, see n.1, *supra*.

[4] As petitioners had prevailed before the Administrative Law Judge, and the briefs on review of the Administrative Law Judge's decision were due and filed years before *Gulton* was decided, there was no opportunity for petitioner expressly to object to retroactive application of *Gulton* until issuance of the decision below. See, *NLRB v. Wayne Transp., a Div. of Wayne Corp.*, 776 F.2d 745, 749 (6th Cir. 1985). The Board implicitly concedes this, contending only that post-decision objection was required (Br. Opp. 7). As explained in text, such objection was promptly made.

clause in the instant case conformed to the rule set forth in the decisions of the Board on the books at the time the clause was negotiated and implemented, and urged the Board to reject the General Counsel's exceptions seeking the application of a new rule to petitioners' conduct. Although petitioners' briefs did not speak expressly in terms of non-retroactivity, they were sufficient to apprise the Board that petitioners objected to the formulation of a new rule that would be applied to this case, given petitioners' reliance on the old rule. Two courts of appeals, in cases where (unlike here) there was no post-decisional objection to retroactive application of *Gulton*, found such an objection adequately manifested by the initial filing of briefs making the same points as the briefs in this case. *Local 900*, *supra*, 727 F.2d at 1190-94; *Wayne Transp.*, *supra*, 776 F.2d at 748-50.[5]

2. The Board also contends that the retroactivity claim advanced here was not made in the court of appeals. In so contending, the Board mischaracterizes the claim that petitioners make here. Thus, the Board asserts: "[T]he petition for certiorari raises for the first time in this case the claim that a discretionary construction of the Act may *never* be applied retroactively. . . . [P]etitioners did not argue below that retroactive application of the *Gulton* rule was *per se* improper because the *Gulton* rule reflects an exercise of discretionary authority by the Board" (Br. Opp. 8, emphasis added). But it is not petitioners' contention that "a discretionary construction of the Act may *never* be applied retroactively"; rather, it is petitioners' contention that a discretionary construction of the Act may not be applied retroactively to actions that were taken at a time when contemporaneous Board decisions—themselves permissible discretionary constructions of the Act—declared such actions to be lawful.

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[5] The Board, at Br. Opp. 7-8, n.5, inaccurately characterizes these decisions as holding that objection was not necessary. As a reading of these decisions will confirm, the courts held, rather, that objection was adequately made.

In the court below, petitioners argued: (1) that the pre-*Gulton* decisions of the Board represented a permissible construction of the Act; (2) that the actions of petitioners condemned here by the Board conformed to those then-controlling decisions; and (3) that no statutory interest would be served by applying the new construction retroactively. Petitioners expressly distinguished this case from those in which agencies have promulgated discretionary constructions as a matter of first impression. Thus, all of the components of the claim advanced here were advanced in the court below.

To be sure, petitioners urged these considerations below in the context of this particular case—contending that as these elements were present the Board could not permissibly apply *Gulton* retroactively to this case. Petitioners did not state below, as they do here in the petition, that the contention they made in the context of this case constitutes a rule of universal applicability in administrative law. But that shift in emphasis does not represent a shift in the nature of the claim. It is the office of a petition for certiorari to demonstrate that an issue arising in a particular case is of sufficient general importance to warrant this Court's plenary consideration. That the petitioner made the same contentions below but without focusing on their broader implications for the state of the law generally does not mean that to highlight the latter in a petition for certiorari alters the nature of the claim.

II. THE TIMELINESS ISSUE

The Board implicitly acknowledges that the decision below on the issue of timeliness under § 10(b) of the Act, 29 U.S.C. § 160(b), would be in conflict with *NLRB v. Auto Warehouses, Inc.*, 571 F.2d 860 (1978), but for the supposed fact that the superseniority clause here was "unlawful on its face" (Br. Opp. 13 & n.6). The Brief in Opposition insists that the clause *is* "unlawful on its face," because it grants superseniority to union officers

as such and does not declare on its face that the entitlement of those officers to superseniority depends upon their performing steward functions (*id.*). But the Board's *decision* in this case clearly refutes this proposition. The clause here conferred superseniority upon several union officers by title, without specifying that entitlement to superseniority depended upon the performance of steward functions. Yet the Board treated the clause as *lawful* with respect to the president and vice-president because *in fact* they performed steward functions (App. 31a). And the Board determined the clause to be unlawful "*as applied* to the recording secretary and treasurer" (*id.* 19a; emphasis added) only because the record evidence established that they "are not involved in grievance processing or other on-the-job contract administration or steward-like duties" (*id.*). Thus, the Board unquestionably treated the lawfulness of the clause as dependent upon the evidence of actual job duties, and did not regard the clause as unlawful on its face. Those who represent the Board in this Court are not free to alter a position taken in the underlying Board decision.

Respectfully submitted,

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